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# REPORTS

OF

515

CASES ARGUED AND ~~DETERMINED~~

IN THE

## SUPREME COURT OF ALABAMA,

DURING

DECEMBER TERM, 1885.

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BY

JNO. W. SHEPHERD,  
STATE REPORTER.

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40639

VOL. LXXIX.

MONTGOMERY, ALA.:

PUBLISHED BY JOEL WHITE.

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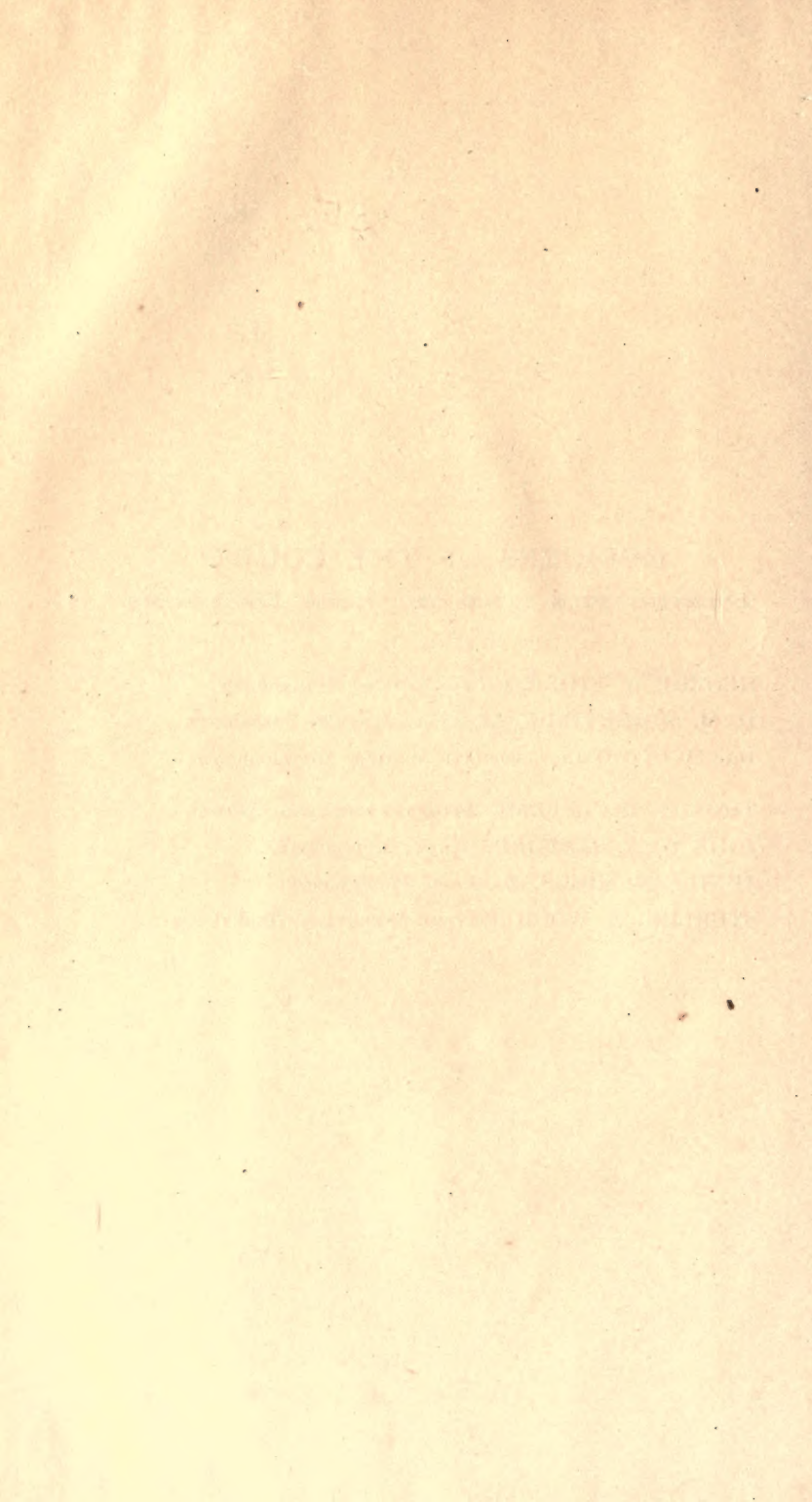
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# CASES

## IN THE

# SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1885.

### **Quartlebaum v. The State.**

*Indictment for Violation of Revenue Law.*

1. *Construction of statute in favor of its constitutionality.*—When a statute is fairly susceptible of two constructions, one of which will uphold, and the other defeat its constitutionality, the former construction will be adopted, even though it be the less natural.

2. *Revenue license-tax on sewing-machine companies; construction and constitutionality of.*—The statutory provision imposing a license-tax of \$25.00 on “every sewing-machine company selling sewing-machines, either themselves or by their agents, and all persons who engage in the business of selling sewing-machines” (Sess. Acts 1884-5, p. 17, §§ 8, 14, sub-d. 20), does not discriminate between companies and natural persons, but authorizes a conviction against either, on proof of a single sale, made under circumstances which show that it was done in the prosecution of the business; nor does the further provision contained in said sub-section, which exempts from the payment of said tax “merchants engaged in a general business, keeping sewing-machines as a part of their stock in trade,” make any unconstitutional discrimination.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The indictment in this case charged that the defendant, “not having first procured a license from the proper authorities, and not being a merchant engaged in a general business, did engage in the business of selling sewing-machines.” A demurrer was interposed to the indictment, on the ground that the law requiring a license was unconstitutional; and the demurrer being overruled, the cause was tried on issue joined on the plea of not guilty. On the trial, as appears from the bill of exceptions, the State introduced evidence showing that the defendant kept a store in Mobile, in which he had sewing-machines for sale, and made sales from time to time; that his stock in trade aggregated about \$1,000, consisting of from twenty to forty machines; and that he also kept other articles for sale, principally patterns, needles, scissors, &c., in value worth one or two hun-

[Quartlebaum v. The State.]

dred dollars. The court charged the jury, *ex mero motu*, "that they must determine whether the defendant was a merchant engaged in a general business, or not; and in order to bring him within the exception provided by the law, the evidence must show that he did a general mercantile business without reference to sewing-machines, and exclusive of them; and unless he did a general business, outside of sewing-machines and other things adjunct thereto, they could not look at his stock of sewing-machines, attachments, and other things incidental thereto, in connection with the other articles of merchandise which he sold under other departments of his business, to determine whether he did a general business or not." The defendant excepted to this charge, and requested the court to instruct the jury, "that to entitle the defendant to an acquittal, on the ground that he was a merchant doing a general business, it is not necessary that he should be a general merchant exclusive of his sewing-machine stock; that it is sufficient, if, taking all of his business together, including the selling of sewing-machines, he was a merchant doing a general business." The court refused this charge, and the defendant excepted.

G. L. SMITH, for appellant.—The statute on which the indictment is founded is unconstitutional, because it makes unjust discriminations between companies (or associations) and individuals. It punishes the act of selling by a company, and authorizes a conviction on proof of a single sale; but a conviction can be had against an individual, only on proof that he was engaged in the business of selling. A company engaged in a general business, selling sewing-machines as a part of the stock in trade, would be required to take out a license, while an individual would not; and a company selling through an agent who did a general business would be required to take out a license, while an individual would not. These are unjust and illegal discriminations, such as this court has condemned. *Smith v. L. & N. Railroad Co.*, 75 Ala. 452. The statute also makes unjust discriminations as between individuals, requiring a license from one whose only business is selling sewing-machines, and not imposing it on those who are engaged in that and some other business.—*S. & N. Ala. Railroad Co. v. Morris*, 65 Ala. 193; *Green v. The State*, 73 Ala. 26; *Home Protection v. Richards*, 74 Ala. 466. The statute exempts merchants engaged in a general business, selling sewing-machines as a part of their stock in trade; and the rulings of the court, as applied to the evidence, took away from the jury the right to determine whether the defendant was not within the terms of this exception.



[Quartlebaum v. The State.]

THOS. N. McCLELLAN, Attorney-General, for the State, cited *Salomon v. The State*, 28 Ala. 83; *Board of Revenue v. Gas Light Company*, 64 Ala. 27; 8 Amer. & Eng. R. R. Cases, 1; 62 Penn. St. 494; *State v. Columbia*, 6 So. Car. 1; 8 Sawyer, C. C. 238.

STONE, C. J.—It is contended for appellant, that the statute under which the indictment was found in this case is violative alike of the State and Federal constitutions.—Constitution of 1875, Art. II, § 6; Fourteenth Amendment, Const. U. S. The precise contention is, that sub-section 20 of section 14 of the revenue statute approved December 12, 1884, discriminates between companies who sell sewing-machines, and persons or individuals who engage in the business of selling sewing-machines. Sess. Acts, 1884-5, p. 17. A second objection is, that it discriminates between two classes of persons who so engage in such business—namely, between persons who are “merchants engaged in a general business,” and persons who are not so engaged. In support of the first of these objections it is urged, that the statute requires a license of a sewing-machine company, before such company will be authorized to sell a single machine, while an individual is required to obtain such license only when engaging in the business.

Unless it is clear that the legislature has transcended its authority, it is our duty to declare its acts constitutional.—*Sadler v. Langham*, 34 Ala. 311; *Stein v. Leeper*, 78 Ala. 517. Where the language of a statute is fairly susceptible of two interpretations, one of which will uphold its constitutionality, and the other defeat it, it is our duty to adopt the former, even though it be the less natural, *ut res magis valeat quam pereat*.

Our present revenue law, commencing with section 8 on page 12, and ending with section 14 on page 19, is devoted to licenses,—a subject of taxation which can not be reached by a mere tax on property. They are a tax on occupations, on amusements, &c., and are levied, sometimes for purposes of revenue, and sometimes as a police regulation. Their purpose is, generally, to regulate a business, and not to interdict, or punish a particular act. Hence we have said, “Under the general law, licenses are required only of such persons as engage in and carry on the business of certain vocations, professions, and employments. Single acts are not licensed, but only a series of acts prosecuted with the intention of reaping a profit, or making a livelihood.”—*Joseph v. Randolph*, 71 Ala. 499, and authorities cited. Section 8 of the revenue law relates to, and, in great degree, controls the whole system of licenses, as now required. It must be considered, in any right interpretation of section 14, sub-section 20. It declares, “It shall be

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unlawful for any person, firm, company or corporation, to engage in or carry on any business for which a license is by law required, without first having paid for and taken out a license therefor." Sub-section 20 enacts, that "Each sewing-machine . . . company, selling sewing-machines . . . either themselves or by their agents, and all persons who engage in the business of selling sewing-machines, . . . shall pay to the State twenty-five dollars for each county in which they may so sell."

We may be pardoned for saying that, when sewing-machine companies sell sewing-machines in any locality, they do it as a business. This is common knowledge, of which we can not be supposed to be ignorant. The very nature of the traffic implies that it is to be done as a business. Entering upon the business, or engaging in the business, it does not require a number of sales to bring the unlicensed offender within the statute. One sale, made under such circumstances, would justify a conviction, whether the sale was made by a company, or through its agent, or by any other person, provided the circumstances showed there was an engaging in the business. So, interpreting section 8 and sub-section 20 of section 14, as having relation to the same subject, and to each other, the enactment is relieved of all imputation of class legislation. It is wholly unlike the sale of intoxicating liquors, which is an offense against the revenue law only when engaged in as a business; while under another statute, a purely police regulation, a single sale without a license is interdicted.

Nor is there anything in the second constitutional objection. Companies of any kind, or corporations, as well as partnerships or individuals, may be "merchants engaged in a general business." For persons so engaged, the revenue law has provided special revenue regulations, which are broad enough to cover every species of merchandise in which they deal; and under that system, they are required to pay what the legislature considered their share of the revenue. If sewing-machines be part of their stock in trade, they are taxed for them as for other merchandise. Their business is in its nature stationary, and there is little or no risk in levying taxes upon their business, on the rule of percentage. That rule may be wholly unsuited and ineffectual for other pursuits, and other lines of business. Much must be left to the discretion of the legislature, for exact equality of taxation can never be reached. So long as the burden falls with equal weight upon every member of a given class, natural and artificial persons alike, it is difficult to formulate an argument that such levy violates any provision of our own, or of the Federal constitution. Neither of them requires a horizontal tax.

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It would tax ingenuity to define the phrase, "merchants engaged in a general business," with such precision as to meet the wants of every case. There would be cases so near the border line, as to render it difficult to declare on which side they fell. It is known that, among large merchants, some carry and operate in much greater variety of merchandise than others do. In cities, the tendency is to special lines, while country merchants must endeavor to supply all the wants of their customers. Hence the inquiry, whether the trader was a "merchant engaged in general business," would frequently become a question for the jury, under proper instructions. The present case presents no such difficulty. It is manifest the defendant was not a merchant engaged in general business, and the City Court might have so instructed the jury. We need not inquire whether the charges given and refused would, under appropriate testimony, be correct or not. They were abstract, and did the defendant no harm.—*Pugh v. Youngblood*, 69 Ala. 296.

The judgment of the City Court is affirmed.

## Anderson v. The State.

### *Indictment for Murder.*

1. *Dying declarations; when admissible.*—On the facts shown in this case, the declarations of the deceased were made under a sense of almost immediate death, from the effects of a wound which he had received, and which caused his death during the same night; and they were properly admitted as dying declarations, although partly made in answer to a question asked him.

2. *Same; memorandum of.*—The admissibility of dying declarations is not affected by the fact that the witness testifying to them, made a written memorandum of them, which was not signed by the deceased, nor read over to him; nor is it necessary to produce the memorandum, though the witness may refer to it to refresh his memory.

3. *Threats by defendant; admissibility as evidence.*—Threats made by the defendant the day before the homicide with which is charged, though not naming the deceased or any other person—as, "that they were in a row, and he would kill some of them before night, if they did not let him alone"—are competent and admissible as evidence against him, and it is for the jury to determine, in connection with all the evidence in the case, whether they in fact had reference to the deceased.

4. *Acts or conduct of defendant before homicide; relevancy of.*—The conduct of the defendant, a few hours before the killing, in taking his brother aside, and talking to him privately, is admissible evidence against him, "as one link in the chain of circumstances intervening during the several hours immediately prior to the killing;" it being shown that the homicide was perpetrated with a gun, that the brother owned a gun, and that the defendant was seen, on the evening before, coming from the direction of his brother's house, and carrying a gun.



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FROM the Circuit Court of Cherokee.

Tried before the Hon. JAMES AIKEN.

The defendant in this case, Peter Anderson, a freedman, was indicted for the murder of Tom Davenport, another freedman, by shooting him with a gun; was tried on issue joined on the plea of not guilty, convicted of murder in the first degree, and sentenced to the penitentiary for life. On the trial, he reserved a bill of exceptions to several rulings of the court on the admissibility of evidence, which are the only matters here presented for revision. It was shown that the deceased was shot one night in October, 1885, and died from the effect of the wounds, during that night, or the next day; that while sitting in his house, with some members of his family, a noise was heard out in his horse-lot, and he went out to see what was the matter; that he called for his gun, as some of the witnesses stated, and immediately a shot was heard; that when his wife and daughter, with several others, got to him, they found him lying on his face, shot in the back, bleeding profusely, and groaning, and carried him into the house. His wife testified: "He said he was not going to live long." Gilbert Beatty testified: "He did not say anything out at the lot, either before or after he was shot. . . . He said he was suffering, and was going to die; that he was shot, and could not live long; did not say anything about who shot him." Anderson Jones testified: "When I went out there, he was lying on his face; when he heard my voice, he called me, and said he was going to die—that he had a death-load in him, and would not get over it. When I went down to him, he said, '*Peter certainly have shot me,*' and that he saw Peter behind a post-oak tree in the lot." To the admission of these declarations of the deceased, the defendant objected, and duly excepted. Squire Roe, a witness for the prosecution, testified: "I live about a half mile from the defendant. I saw Tom Davenport after he was shot, about 11 o'clock that night; and I saw the wounds after his death. I don't remember hearing him say anything about dying. I saw him the next day about 10 o'clock. He was groaning mightily; was not spitting up blood. He said he could not live long in that fix, but nothing more that I now recollect; said nothing about dying, that I recollect. Henry Howell said to him: '*Tom, we have come to see if you know who shot you; you can't live long.*' Deceased replied, '*I can't live long in this fix,*'" and he made a statement, which was reduced to writing. The defendant objected to the statement made by said Howell, and to the answer of the deceased; and he also objected to any oral statement by the witness, of that which was taken down in writing; which several objections were overruled by the court, and the defendant excepted. The witness,



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continuing, said : "Mr. Howell asked him who killed him, and he replied, '*Pete Anderson.*' He said he heard a noise down at the horse-lot, and went down there ; and just after he called for his gun, and turned, looking toward the house, Pete shot him." The defendant moved to exclude this evidence from the jury, and duly excepted to the overruling of his motion. The written statement was not produced. This was, in substance, all the evidence adduced as to the several dying declarations:

Mrs. W. Hickman, a witness for the State, thus testified : "Defendant passed through our yard the day before the shooting. He said, *they were in a row*—did not say who—and *if they did not let him alone, he would kill some of them before night.*" The defendant objected to this evidence, and moved to exclude it from the jury ; and he excepted to the overruling of his objections. There was no proof of any former difficulty or quarrel between the defendant and the deceased.

James Anderson, a brother of the defendant, was examined as a witness for the State, and testified : "I own a shot-gun. It was in the house where I lived, at the time the deceased was shot. Nobody had it. I was working at Mr. McHugh's. Henry Barnett came there that night ; had been out possum-hunting. They stayed a while." T. H. Ward, the next witness for the State, testified : "I saw defendant the evening before Tom was killed. He was going towards home, and was coming from the direction in which James Anderson lived. He had a gun. It was between sundown and dark." Henry Barnett, a witness who had testified to dying declarations made by the deceased, as above stated, further testified : "I met defendant, the night Tom Davenport was killed, about one mile and a half from where he lived, going towards home. He had nothing. This was after dark, tolerably early in the night. I went with him to Mr. McHugh's, and we stopped there a quarter of an hour. I went on towards Howell's ; don't know which way Pete went. Pete took his brother aside, and talked to him." The defendant objected to this last statement of the witness, and moved to exclude it from the jury ; and he duly excepted to the overruling of his objection and motion. The witness added : "I did not hear what he said to his brother. I was five or six steps from him at the time. It was just after dark when I saw him."

WALDEN & SON, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—We think it clear that the predicate

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was sufficient to authorize the admission of the dying declarations of the deceased. He was fatally wounded by being shot with a gun, from the effects of which he immediately fell to the ground. He lay there perfectly helpless, bleeding profusely from his wound, and spitting blood frequently. He was discovered, in a few minutes after the report of the gun was heard, and was suffering with great pain, and groaning heavily. He declared that he was going to die on the spot where he had fallen—that he “had a death-load in him, and would not get over it,”—that he “was not going to live long.” The shooting was done about 11 o’clock at night, and the death of deceased ensued the same night, so far as we can infer from the evidence in the record.

There can be little or no doubt of the fact, that the deceased, at the time of making these declarations, believed that he was at the point of death—that the surrounding circumstances, in other words, impressed him with a sense of almost immediate dissolution. The declarations were, therefore, admissible, and it was immaterial that one of these statements was elicited by an inquiry propounded to the declarant.—1 Greenl. Ev. §§ 156–158; *Reynolds v. State*, 68 Ala. 502; *West v. State*, 76 Ala. 98; *Kilgore v. State*, 74 Ala. 1.

The fact that a written memorandum was made of such dying declarations, did not preclude the right to prove them by oral evidence. It is not shown that this statement was read over to the deceased, or signed by him. It was a mere memorandum of what was said, not in itself original evidence, but competent only to be referred to by the witness who made it, for the purpose of refreshing his memory.—1 Greenl. Ev. (14th Ed.) § 161; *Com. v. Haney*, 127 Mass. 455.

The threat shown to have been made by the defendant on the day before the killing, as testified to by the witness Hickman, was properly allowed to go to the jury, although it was of a general character, and menaced no person definitely designated. It may have had reference to the deceased, and this was a question to be determined by the jury, in connection with the other facts in evidence.—*Jones v. State*, 76 Ala. 8; *Ford v. State*, 71 Ala. 286; *Harrison v. State*, 78 Ala. 5.

We see no error in admitting the testimony of the witness Barnett, as to the conduct of the defendant, a few hours before the deceased was killed, in taking his brother aside, and talking to him privately, when they met at McHugh’s. The evidence showed that the brother owned a gun, the kind of deadly weapon with which the homicide in question was perpetrated, and that defendant was seen coming from the direction of his brother’s house, the evening before the killing, carrying a gun. This evidence was admissible, as was said in

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*Ford's case*, 71 Ala. 396, "as one link in the chain of circumstances intervening during the several hours immediately prior to the killing," which tended to interpret his conduct.

We discover no error in the record, and the judgment is affirmed.

## Jordan v. The State.

### *Indictment for Murder.*

1. *Threats by defendant.*—A threat made by the defendant, a few minutes before the fatal difficulty, to kill "any body who hits M.," though having immediate reference to one R., who had just been quarreling with said M., is admissible as evidence against him, when it is shown that the deceased soon afterwards struck said M., and that the difficulty between him and the defendant at once ensued.

2. *Error without injury, in admission of evidence prima facie irrelevant.*—The admission of evidence which is at the time *prima facie* irrelevant, but the relevancy of which is disclosed during the further progress of the trial, is not a reversible error.

3. *Same; admission and subsequent exclusion of evidence.*—If evidence is improperly admitted, but afterwards excluded, the error is thereby cured; but the jury should be instructed, clearly and explicitly, to discard the evidence altogether.

4. *Impeaching witness.*—It is permissible for the defendant to prove the fact of a previous difficulty between himself and a witness for the prosecution, as tending to show ill-will, bias or prejudice on the part of the witness, and thereby discrediting him; but the particulars or merits of the difficulty can not be inquired into.

5. *Homicide by two persons.*—Where two persons are jointly indicted and tried for murder, and the evidence shows that one fired the fatal shot, while the other cut the deceased with a knife during the difficulty; the latter is not guilty of murder, unless the cut with the knife contributed to the death of the deceased, or unless preconcert or community of purpose between the two defendants is shown, rendering each liable for the acts of the other.

6. *Charge as to inference of malice from character of weapon.*—A charge which instructs the jury, "if they believe from the character of the weapon used that the shooting was with malice, then the defendant would be guilty of murder," authorizing the inference of malice from the character of the weapon used, without regard to the other circumstances in evidence, is erroneous.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The defendants in this case, Handy Jordan and Jule Jordan, were jointly indicted for the murder of Albert York, by shooting him with a pistol, or, as alleged in the second count, by cutting him with a knife; and being jointly tried on their several pleas of not guilty, and convicted of murder in the second



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degree, were sentenced to imprisonment in the penitentiary, the former for ten, and the latter for seventeen years. On the trial, a bill of exceptions was reserved by the defendants, which purports to set out "the substance of all the evidence adduced." It was shown that the killing occurred on a Friday night in November, 1885, at a "dance" given at the house of one Williams; that the owner of the plantation had told Williams and the deceased, that they must maintain order at the dance; that one Mason Taylor, who was present, and under the influence of liquor, became noisy, and was taken out of the house by the deceased and one Raoul, about a quarter of an hour before the killing, and there had some angry words with Raoul; that a few minutes afterwards, the parties having all returned to the house, the deceased jerked Jule Jordan's pistol out of his pocket, and gave it to one Beasley, in an adjoining room, who afterwards returned it to Jule; that Mason Taylor, in getting out of the way of the deceased, who was dancing, trod on the dress of a woman, who thereupon remonstrated with him; that Taylor then said, pulling off his coat, "it seemed that everybody was down on him;" that the deceased then cursed Taylor, told him to "quit his fuss," and knocked him down; that Jule Jordan then said to the deceased, "You ought to be ashamed of yourself to strike Taylor that way;" to which the deceased replied, "Do you take it up?" or words to that effect, and was then jerked out of the room by his wife; but he soon returned, and, advancing towards Jule Jordan, was cut in the shoulder with a knife by Handy as he passed, and shot by Jule Jordan as they encountered each other. Some of the witnesses testified that the deceased had an oak staff in his hand, which he had picked up at the door when his wife pulled him out, while others testified that they commenced to scuffle with each other immediately after the above words spoken; and the evidence was conflicting as to many other particulars. The deceased died on the next Sunday night, from the effects of the pistol shot, as the physician testified.

It was shown that the deceased and said Jule Jordan resided on the same plantation on which Williams lived, at whose house the dance was given, while Handy Jordan lived on an adjoining plantation; "and that the deceased and the defendants were on friendly terms before the night of the difficulty." "The State offered to prove, by a witness who was present at the time, that while said Mason Taylor and Raoul were quarreling and having their difficulty, Jule Jordan, who was present, and who had in his hand the pistol with which he afterwards shot the deceased, said, '*Any body who hits Mason Taylor, I'll put a light hole through;*' or, '*Any body who hits Mason Taylor, I'll hit him.*' Said Jule Jordan objected to



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this testimony, but the court overruled the objection, and admitted the evidence; to which said Jule Jordan excepted." The court also admitted, against the objections of the defendants, declarations made by the deceased soon after the difficulty, in these words: "*I'm shot and cut: Handy cut me, and Jule shot me;*" to the admission of which declarations as evidence the defendants excepted. The bill of exceptions further shows that, on the introduction of other evidence, the court subsequently excluded these declarations from the jury. George Raoul was introduced as a witness on the part of the prosecution, and was asked, on cross-examination, whether he was on friendly terms with Handy Jordan; to which he answered, that he was. He was then asked by said Handy's counsel, if he had not, before the killing, had a difficulty with Handy about his (witness') wife; and several questions were asked, in different form, as to the cause or merits of that difficulty; all of which were disallowed by the court, on objection by the State, and the defendants excepted to each of these rulings. There were other rulings on evidence to which exceptions were reserved, but they require no particular notice.

The court gave the following (with other) charges to the jury: (1.) "If the jury believe from the evidence, beyond a reasonable doubt, that Handy Jordan cut the deceased with a knife, and did so with the intent to kill the deceased, or with intent to aid Jule Jordan in taking the life of the deceased, and not in self-defense, or defense of his brother from great bodily harm; then Handy Jordan would be guilty of murder, if the deceased was killed in said difficulty, in Montgomery county, and before the finding of this indictment." (3.) "If the jury believe from the evidence, beyond a reasonable doubt, that words had passed between the deceased and Jule Jordan; and that the deceased left the house, and immediately returned; and that as he was passing across the room, in the direction of said Jule Jordan, he was cut by Handy Jordan, and turned towards said Handy, and while in this position Jule Jordan shot him; then said killing was unlawful, and if the jury believe, from the character of the weapon used, that the shooting was with malice, said Jule Jordan would be guilty of murder in the second degree; and if said Handy Jordan was present, aiding and abetting the said Jule Jordan, he would be guilty of the same offense, if it occurred in this county, and before the finding of this indictment." To each of these charges the defendants separately excepted.

THOS. H. WATTS, Jr., and ALEX. TROY, for appellants.

THOS. N. McCLELLAN, Attorney-General, for the State.

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CLOPTON, J.—It may be conceded that the threat made by defendant, against “any body who hits Mason Taylor,” had immediate reference to Raoul, between whom and Taylor there were, at the time, words and a difficulty; and was *prima facie* inadmissible, under the general rule, that a threat to kill or injure one person is not admissible in evidence under an indictment charging the murder of another person. The threat, however, was not directed against Raoul by name, but had a general reference to any person who did the designated act. If evidence *prima facie* irrelevant, becomes relevant during the progress of the trial, its admission is not an error, which will work a reversal. The threat became relevant, on the introduction of testimony that deceased shortly thereafter struck Taylor, which resulted in bringing on the difficulty between the accused and the deceased. Whether the deceased came within the scope of the threat, and its probative force, were questions for the determination of the jury.—*Ford v. State*, 71 Ala. 385; *Harrison v. State*, 75 Ala. 5; Whar. Crim. Ev., § 756.

If there was error in admitting the dying declarations proved by the witness, Johnson, certainly the subsequent exclusion of the evidence was not erroneous. But, in such case, the court should endeavor, as far as practicable, to remove any unfavorable and erroneous impression which such evidence may have made, and should clearly and explicitly instruct the jury to disregard it altogether.—*Carlisle v. Hunley*, 15 Ala. 623.

The fact of a previous difficulty between the accused and a witness called by the prosecution, is admissible, as tending to show ill-will, bias, or prejudice, and to aid the jury in considering the weight to which the testimony of such witness is entitled; but it is not permissible to inquire into the cause of such difficulty. Such inquiry raises collateral issues, which are calculated to confuse the minds of the jury, and to divert their consideration from the real issue.

By one of the alternative propositions asserted in the first charge given at the request of the prosecution, the jury were substantially instructed, that the defendant Handy Jordan, if he cut the deceased with a knife, with the intent to kill, is guilty of murder. The proposition is, that the mere fact of cutting with the intent to kill constitutes murder, irrespective of any community of purpose, or of a malicious intent, or of the character and effect of the wound, or of any extenuating circumstances under which the defendant may have participated. It is conceded that, if Jule was in the wrong by bringing on the difficulty, the guilt or innocence of Handy depends on the same principles as if no relationship existed. Whether Handy is guilty of murder, depends either on the principle, that

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where two or more persons preconcert to commit a felony, or to do an act unlawful in itself, each is responsible for the acts of any of the others, done in the prosecution of the common design; or, if there be no community of purpose, on the rule, that where a third person voluntarily takes part in a pending difficulty, under circumstances which do not excuse, and kills, his guilt will be determined on the same principles as the guilt of the original parties. In the one case, community of purpose is essential to the liability of one of the accused for the act of the other. The actual perpetrator alone is responsible for an act having no connection with a common purpose. In the other case, the offense of Handy is separate and independent of that of Jule, the guilt of the former not being dependent upon the guilt of the latter. In such case, it is requisite that the wound inflicted by Handy shall have been mortal, the death of the deceased only being accelerated by the subsequent act of Jule. Without a preconcert to kill the deceased, or to do him great bodily harm, or unless the wound inflicted with the knife was fatal, or materially contributed to produce death, Handy can not be guilty of murder or manslaughter, unless he was present for the purpose of aiding or abetting Jule.

The record fails to disclose any evidence tending to show a preconcert, or the character of the wound inflicted by Handy; but, conceding there is sufficient evidence to present either or both of these aspects of the case, the charge excludes from the consideration of the jury elements of the offense essential under the circumstances; and makes Handy guilty of murder, though there was no preconcert, no malicious intent, and the cutting with the knife did not produce death, nor materially contribute thereto, and though the deceased was killed by Jule after the cutting.—*Frank v. State*, 27 Ala. 37; *Tidwell v. State*, 70 Ala. 33.

The third charge given at the request of the prosecution is, as to Handy, obnoxious to the same objections. It is erroneous as to Jule, in withdrawing from the consideration of the jury, on the question of malice, the circumstances of the killing, and authorizing its presumption from the character of the weapon used, without reference to the other circumstances.

As the defendants can not be convicted, on proper defense being made, of murder in the first degree on another trial, it is unnecessary to consider the charge relating to that offense.

Reversed and remanded.



## Carney v. The State.

### *Indictment for Seduction.*

1. *Seduction; constituents of offense.*—To authorize a conviction for the seduction of an unmarried woman (Code, § 4188; Sess. Acts 1880-81, p. 48,) the jury must be satisfied beyond a reasonable doubt that the seduction was accomplished under promise of marriage, or by other means specified in the statute, one or more; that the relation of cause and effect existed between the alleged means and the accomplished fact.

2. *To that witness may testify.*—A witness, testifying to the defendant's behavior or conduct towards the woman alleged to have been seduced by him, can not be permitted to state that he "*acted towards her as a suitor*," nor that he "*acted towards her as a lover*;" these being inferential facts to be found by the jury, and not such a "*short-hand rendering of the facts*" as a witness may state.

3. *Examination of witness; interruption by court.*—While a witness is under examination on the stand, it is alike the duty of the presiding judge to protect him, if unfairly dealt by, and to abstain from interference so long as the examination is properly conducted; and this court can not, on error or appeal, revise the exercise of this discretionary power, when the record does not show that any injury could have resulted from the interference.

4. *Charge as to reasonable doubt.*—A charge to the jury, in a criminal case, in these words: "In making up their verdict, and after having considered all the evidence, if the jury entertain a reasonable doubt as to the truth of any part of the evidence, they should give the defendant the benefit of that doubt, and discard all the evidence adverse to him, as to which they entertain such reasonable doubt, and give consideration to all that portion which is favorable to him, and as to which they have reasonable doubt, so that he may obtain the full benefit of every reasonable doubt; and if, after treating the entire evidence in this way, they entertain a reasonable doubt as to any material element of the offense, they should give the defendant the benefit of that doubt, and acquit him,"—"is too complicated to be given in charge to a jury, and asserts one proposition which is not sound."

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The defendant in this case was indicted for the seduction of Katie Nicholas, an unmarried woman; and being tried on issue joined in the plea of not guilty, was convicted, and sentenced to imprisonment in the penitentiary for the term of fifteen months. On the trial, as the bill of exceptions shows, the prosecutrix was examined as a witness for the State, and testified to her engagement to be married to the defendant, and to her criminal connection with him during their engagement; and in stating the circumstances attending their first criminal act,



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on the gallery of the house at which she was then living, on their return from a dance on the night of July 4th, 1883, said that the defendant took off her shoes for her, "and talked love, and said they were engaged to be married, and that she must do whatever he told her; and after this conversation he had sexual intercourse with her." On cross-examination, being questioned about the previous engagement of marriage and the circumstances attending it, she stated that, while walking together some months previously, the defendant asked her to marry him, and she promised to do so; that their engagement was mentioned again at the house of a friend; that their next conversation on the subject was "in the first part of the year 1883," while they were alone together on the gallery of the house, when he said, "Miss Katie, I am going to marry you," and she replied, "All right;" and that on the next occasion, being the night of said July 4th, "the defendant just commenced the conversation by saying, 'Miss Katie, I am going to marry you.'" The bill of exceptions then proceeds: "Here, the court interrupted the examination, of its own motion, saying that the examination, up to this time, had been exclusively as to conversations about marriage, and it might confuse the witness; and that if there was any conversation preceding that about marriage, the witness might say that a conversation had taken place preceding the conversation about marriage, and then go on and tell it, if one did take place. To which interruption the defendant objected and excepted."

T. B. Judge, who was connected by marriage with the prosecutrix, and at whose house she lived while visited by the defendant, was examined as a witness for the State, and testified, in answer to questions by the solicitor, "that he never saw anything in the conduct between the defendant and Katie Nicholas, tending to show any boldness or want of chastity on her part;" "that they were very intimate;" that the defendant "acted towards Katie Nicholas as a suitor;" that he "acted towards her as a lover;" that he (witness) "was a married man, and had been all along there under similar circumstances, and that the conduct of the parties looked that way to him." To each portion of this testimony, as shown by the quotation marks, the defendant objected, and duly excepted to its admission. Exceptions were also reserved to several other rulings on evidence, which require no special notice.

Among other charges in writing, the defendant asked the following: "2. In making up their verdict, and after having considered all the evidence, if the jury entertain a reasonable doubt as to the truth of any part of the evidence, they should give the defendant the benefit of that doubt, and discard all the evidence adverse to him, as to which they entertain such

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reasonable doubt, and give consideration to all that portion which is favorable to him, and as to which they have a reasonable doubt, so that he may obtain the full benefit of any reasonable doubt; and if, after treating the entire evidence in this way, they entertain a reasonable doubt as to any material element of the offense, they should give the defendant the benefit of that doubt, and acquit him." The court refused this charge, and the defendant excepted to the refusal.

G. L. SMITH, for the appellant.—(1.) The interruption of the prosecutrix by the court, during her cross-examination, was calculated to call her attention to the improbability of her story, and give her an opportunity to amend and qualify it, as she afterwards did; and to this extent it prejudiced the defendant. (2.) The several statements of the witness Judge, to the admission of which exceptions were reserved, were not the statements of facts, but the mere conclusions or opinions of the witness; and they ought not to have been received.—*Haines v. Brownlee*, 63 Ala. 276; *Pollock & Co. v. Gantt*, 69 Ala. 378; *Talladega Insurance Co. v. Peacock*, 67 Ala. 253; *Whiznant v. The State*, 71 Ala. 385; *Abbott, Downing & Co. v. Gillespie*, 75 Ala. 187; *National Bank v. Jeffries*, 73 Ala. 192; *Minniece v. Jeter*, 65 Ala. 230; *Tanner v. L. & N. Railroad Co.*, 60 Ala. 643; *Johnson v. The State*, 17 Ala. 618; *McAdory v. The State*, 59 Ala. 92; *Gassenheimer v. The State*, 52 Ala. 317. (3.) In arriving at the conclusion of guilt or innocence, the jury ought not to discard entirely any fact or circumstance, because inconclusive in itself; but, if, after having considered all the evidence together, and given to each part all the corroboration and support it is entitled to receive from the other parts, they entertain a reasonable doubt as to the truth of any part, they ought to give the prisoner the benefit of that doubt. Weak or inconclusive evidence, tending to prove the issue, may properly be considered, while false evidence should never be made the basis of a verdict.

E. L. RUSSELL, and B. B. BOONE, with THOS. N. MCCLELLAN, Attorney-General, for the State.—(1.) There was no error in admitting the several statements of the witness Judge to which objection was made. Each was but a "short-hand rendering of the facts," to which a witness can not, as a general rule, testify more explicitly.—*Blackwell v. Hamilton*, 47 Ala. 472; *Polk v. The State*, 62 Ala. 237; *Railroad Co. v. McLendon*, 63 Ala. 266; *Blackman v. Johnson*, 35 Ala. 252; *Angell v. Rosenberg*, 12 Mich. 241; *Insurance Co. v. Mosely*, 8 Wallace, 404; *Tobin v. Shaw*, 45 Maine, 331; *Trelawney v. Colewan*, 2 Stark. 191; *McKee v. Nelson*, 4 Cowen, 355; Lawson on Expert and

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Opinion Evidence, 466; 1 Greenl. Ev. § 440; Whart. Ev. 612; 90 Indiana, 466; 72 Indiana, 167; 62 Indiana, 334; 69 Indiana, 108; 96 Indiana, 550; 71 Penn. St. 161; *Aurora v. Hillman*, 90 Ill. 66; 68 Maine, 279. (2.) The charges asked were properly refused.—*Scott v. Lloyd*, 9 Peters, 418; 39 Wisc. 558; Abbott's Trial Briefs, 150; *Ming v. The State*, 73 Ala. 2.

STONE, C. J.—The defendant was indicted and convicted under section 4188 of the Code of 1876, as amended by act approved February 25th, 1881.—Sess. Acts, 1880-81, p. 48. The statute declares, that "Any man, who, by means of temptation, deceptions, arts, flattery, or a promise of marriage, seduces any unmarried female in this State, shall be deemed guilty of a felony," *etc.* The chief act by which the alleged seduction was accomplished in this case, was, as it is claimed the proof tends to show, a promise of marriage. The statute provides, that "no conviction shall be had under this section on the uncorroborated testimony of the female upon whom the seduction is charged" (to have been committed). In *Wilson v. The State*, 73 Ala. 527, 533, we said: "The essential elements of the offense, as it is described by the statute, are—first, the woman must be unmarried; second, she must be induced to a surrender of her chastity by a promise of marriage, or by the arts or deception of the man." These are two of the elements of the offense, which, to authorize conviction, must be shown with that measure of proof requisite in criminal cases. And the promise of marriage, arts, or deceptions, as the case may be, must sustain the relation to the accomplished purpose—the consummated offense—as cause to effect, or the case is not brought within the statute. We do not mean to say that, to sustain conviction, the alleged promise of marriage must be found by the jury to have been the sole moving inducement to the surrender of chastity charged to have been made; but that no conviction should be had, unless the jury are convinced beyond a reasonable doubt that there was a fall from virtue, and that that fall was brought about by defendant's "temptation, deceptions, arts, flattery, or promise of marriage," either one or more, or all of these co-operating to produce the result. This is what we mean when we say, the means or inducement employed must sustain the relation to the act accomplished, of cause to effect.—*Cunningham v. The State*, 73 Ala. 51.

Human emotions and human passions are not, in themselves, physical entities, susceptible of proof, as such. Like the atmosphere, the wind, and some acknowledged forces in nature, they are seen only in the effects they produce. Pleasure, pain, joy, sorrow, peace, restlessness, happiness, misery, friendship,



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enmity, anger, are of this class. So, tenderness, sympathy, rudeness, harshness, contempt, disgust, the outcrop of emotional *status*, can not, in their constitution, be made so far physical facts, or entities, as to become the subject of intelligible word description. They are proved by what is called opinion evidence. Not the mere unreasoning opinion, or arbitrary conclusion of the witness, but his opinion based on experience and observation of the conduct, conversation, and facial expression of others, in similar emotional conditions. Facial expression and vocal intonation are so legible, as that brutes comprehend them; and yet human language has no terms by which they can be dissected, and explained in detail. The reasoning in such cases is *a posteriori*, and the major proposition is but the sum or resultant of every one's experience and observation. The following authorities will elucidate the rule we have been attempting to explain. Possibly some of them carry the principle too far.—*S. & N. R. R. Co. v. McLendon*, 63 Ala. 266; *Bennett v. Fail*, 26 Ala. 605; *Wilkinson v. Mosely*, 30 Ala. 562; *Fountain v. Brown*, 38 Ala. 72; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279; 1 Greenl. Ev. §§ 102, 440; Lawson's Expert & Opinion Ev. 466; 2 Phil. Ev. (4th Ed.), 182; *Ins. Co. v. Mosely*, 8 Wall. 397; *Trelawney v. Colman*, 2 Stark. Rep. 191; *McKee v. Nelson*, 4 Cow. 355; *Tobin v. Shaw*, 45 Me. 331. See, also, the numerous authorities on the brief of counsel.

The rule, however, must not be carried too far. It is born of necessity, and it must end with the necessity which calls it into being. It allows this concrete mode of proving emotional *status*, but it does not allow proof of what such emotional *status* will generally or probably lead to. That is an inferential conclusion, which must be left to the determination of the trying body. In a trial for murder, it is competent to prove the defendant was *at enmity* with the deceased, or the contrary. It would not be competent to prove that the relations of the parties were such that they would or would not be likely to cause one to slay the other. Nor would it be permissible to prove in the concrete, or as opinion evidence, that the accused acted like a person who desired to slay his adversary. That would be a question for the jury to determine on all the evidence. We might offer other illustrations.—*Richards v. Richards*, 37 Penn. St. 225; *Johnson v. Ballew*, 2 Por. 29.

The witness Judge was allowed to testify, that "defendant acted towards Katie Nicholas as a suitor." To this defendant excepted. A suitor, in the sense here employed, is "one who solicits a woman in marriage." We think this was not a subject for expert, or opinion evidence. It is not every lover who solicits marriage. Nor do we think that human experience and



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observation can furnish a rule for determining when social relations between persons of the opposite sex indicate matrimonial intentions. Human dispositions, and habits of social intercourse, are too variable for that. The City Court erred in admitting the evidence pointed out above.

Nor do we think this witness should have been allowed to give his opinion that the accused "acted towards Katie Nicholas as a lover." Love between the sexes has different constituents from those found in mere friendship. It is itself very variable in its constitution. It may be refined, having elevated aims, or it may be gross, in which baser desires predominate. Still, to discriminate between these, it would seem, would be too difficult and uncertain in its exercise to allow it to become a factor in judicial administration. In 1 Whar. Ev. § 510, it is said: "An inference necessarily involving certain facts, may be stated without the facts." He adds: "When the facts are not necessarily involved in the inference (*e. g.*, when the inference may be sustained upon either of several distinct phases of fact, neither of which it necessarily involves), then the facts must be stated. In other words, when the opinion is the mere shorthand rendering of the facts, then the opinion can be given, subject to cross-examination as to the facts on which it is based." We do not think a witness should be allowed to testify, from a mere observance of conduct, demeanor, or social intercourse, that the one acted towards the other as a lover. See 1 Whar. Ev. § 509.

The suggestion made by the presiding judge to the witness Katie Nicholas, while under cross-examination, can scarcely be reviewed here with safety. It is alike the duty of the court to protect a witness unduly dealt by, and to abstain from interference when the examination is properly conducted. Much must be left to the discretion of the judge presiding. We are unable to perceive that any injury was done in this case by the remark of the presiding judge.

The rulings on the offer made to discredit Mrs. Kemper will not arise again in the form here presented, and we need not consider them.

The second charge asked by defendant's counsel was rightly refused. It is too complicated to be given in charge to a jury, and asserts one proposition which is not sound.

The other rulings are free from error.

Reversed and remanded.

**Davis v. The State.***Indictment for Perjury.*

1. *Sufficiency of indictment in describing judicial proceeding.*—In an indictment for perjury (Code, § 4813; p. 995, Form No. 41), while it is sufficient to state “the substance of the proceedings”, an averment that the offense was committed on the trial of A. B. “under an indictment for the offense of burglary”, not stating the name of the person on whose property it was committed, is wanting in necessary certainty and definiteness.

FROM the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

The indictment in this case charged that the defendant, Roman Davis, “on his examination as a witness, duly sworn to testify, on the trial of one Henry Dentist, in the Circuit Court of Clarke county, Alabama, at the Spring term thereof, 1885, under an indictment for the offense of burglary, which said court had authority to administer said oath, falsely swore,” &c.; “the matters so sworn to being material, and the oath of the said Roman Davis in relation to such matters being willfully and corruptly false.” The defendant demurred to the indictment, “because it fails to aver that the testimony averred to have been given by the defendant was willfully and corruptly false, and because the same is not sufficient under the requirements of the statute or the common law.” The court overruled the demurrer, and its ruling thereon is the only matter here presented for revision.

DUNN & PILLANS, for the appellant, cited *Jacobs v. The State*, 61 Ala. 448; *Brown v. The State*, 47 Ala. 47; *Gibson v. The State*, 44 Ala. 17–23; *Lewis v. The State*, 3 Ala. 602.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—In an indictment for perjury, it is provided by statute that it is not necessary to set forth the pleadings, record, or proceedings, with which the false oath is connected, but only to state “*the substance of the proceedings*, the name of the court or officer before whom the oath was taken, and that such court or officer had authority to administer it, with the necessary allegations of the falsity of the matter on which the perjury is assigned.”—Code 1876, § 4813. This is,

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substantially, the same as the statute on this subject now prevailing in England; as enacted by Parliament.

The indictment in this case does not set out "the substance of the proceedings" in the cause in which the act of perjury is alleged to have been committed. The court, time of trial, and the name of the defendant in the cause are stated, but the charge or purport of the indictment itself is not stated with sufficient certainty. It will not suffice to allege that the crime charged was burglary. The owner of the property upon whose property the crime was perpetrated should at least be specified. It would be as definite to aver that the trial was of a certain person for murder, without averring the person murdered. The form prescribed shows that this would be lacking in certainty, and insufficient.—Form No. 41, Code, 1876, pp. 995–6.

The other objection urged to the indictment can be easily corrected, and need not be considered, although we are inclined to think there is nothing in it.

The judgment is reversed, and the cause remanded. The prisoner will be retained in custody, until discharged by due course of law.

## Smith v. The State.

### *Indictment for Assault with Intent to Murder.*

1. *Preferring new indictment; limitation of prosecution.*—When a criminal prosecution is dismissed, because the indictment is not signed and indorsed as required by the statute (Code, § 4777), an entry of record may be made, stating the facts, and ordering another indictment to be found (*Ib.* § 4819); and a new indictment being found, the time which elapsed between the finding of the two indictments must be deducted (*Ib.* § 4820), in computing the bar of the statute of limitations.

2. *Cross-examination of defendant, testifying as witness for himself.* When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness for himself, he can not be cross-examined, against his objection, as to former indictments against him for other offenses, which are not pertinent to the issue to be tried.

FROM the Circuit Court of Calhoun.

Tried before the Hon. LEROY F. BOX.

The defendant in this case, M. O. Smith, was indicted for an assault on C. C. Latham, with the intent to murder him; and was tried on issue joined on the plea of not guilty. On the trial, as the bill of exceptions shows, the State introduced said Latham as a witness, who was the father-in-law of the de-



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fendant, and who testified as to the circumstances attending a quarrel and difficulty between them, which occurred in the house in which they were living together, and during which the defendant fired a pistol at said Latham. The defendant, being examined as a witness in his own behalf, gave his version of the quarrel and difficulty; and his testimony tended to show that he acted in self-defense. On cross-examination of the defendant, the court allowed him to be asked, against the objection of his attorney, and required him to answer, whether he had not, "prior to this trial," been indicted in the Circuit Court of Shelby county, for trespass after warning; which questions he answered in the affirmative, but reserved exceptions to the overruling of his objections. After conviction, the defendant made a motion in arrest of judgment, on grounds stated in the opinion of the court; and his motion was overruled.

BROTHERS & WILLETT, for the appellant, cited *Mason & Franklin v. The State*, 42 Ala. 543; 1 Greenl. Ev. § 445; *Railroad Co. v. Stimpson*, 14 Peters, 461; 6 Watts & Ser. 75; 2 Dutch. N. J. 463; *Toole v. Nicholi*, 43 Ala. 416; *Turnipseed v. The State*, 6 Ala. 664.

THOS. N. McCLELLAN, Attorney-General, for the State, cited *Diggs v. The State*, 77 Ala. 68; Code, §§ 4817-20, and cases cited in note; *Ingram v. The State*, 67 Ala. 72.

CLOPTON, J.—Section 4819 of the Code provides: "When the judgment is arrested, or the indictment quashed, on account of any defect therein, or because it was not found by a grand jury regularly organized, or because it charged no offense, or *for any other cause*, the court may order another indictment to be preferred for the offense charged, or intended to be charged; and in such case, an entry of record must be made, setting forth the facts."

An indictment was preferred against the defendant, for assault with intent to murder, at the August term, 1882, of the Circuit Court. At the January term, 1886, the prosecution was dismissed, on the ground, that the indictment was not indorsed "a true bill," signed by the foreman of the grand jury, as required by section 4777. An entry of record was made, setting forth the facts, and ordering another indictment to be preferred for the offense charged. Another indictment was preferred, at the same term, on which the defendant was tried and convicted. A motion in arrest of judgment was made, on the ground, that the record shows the offense was committed more than three years before the indictment was preferred, and was barred by the statute of limitations.

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By section 4820, when a new indictment is preferred under the provisions of section 4819, the time which elapsed between the finding of the first and the subsequent indictment must be deducted from the time limited by law for the prosecution of the offense. Without deciding whether, in the state of the record, the bar of the statute of limitations can properly be raised by a motion in arrest of judgment, the minute-entry and order for a new indictment substantially conform to the statute. The motion in arrest of judgment was properly overruled. *Weston v. State*, 63 Ala. 155.

In *Clarke v. State*, 78 Ala. 474, we had occasion to consider the extent of inquiry permissible on cross-examination of a defendant in a criminal prosecution, while testifying as a witness in his own behalf, at his own request. We then held, that on objection being made by the defendant, through his counsel, the prosecution can not inquire into past offenses, which the defendant had really, or was supposed to have committed, and which were not connected with the offense for which the defendant is on trial, nor pertinent to the issue, and did not tend to elucidate it. The court erred in not excluding the question directed to a previous indictment against the defendant, and the offense for which he was indicted.

For this error, the judgment must be reversed.

Reversed and remanded.

## Jones v. The State.

### *Indictment for Assault with Intent to Murder.*

1. *Conviction of less offense than charged.*—Under an indictment for an assault with intent to murder, a conviction may be had of a simple assault, or an assault and battery; consequently, a charge which claims an acquittal, because the evidence fails to establish the felony, is properly refused.

2. *Self-defense.*—When the plea of self-defense is relied on, it is always important to inquire who provoked the difficulty; for the party who provoked it can not set up that plea.

3. *Charge as to "legal excuse" for shooting.*—What would be a "legal excuse" for the act of shooting, is a question of technical, legal learning, which the court should define, and should not leave to the decision of the jury; and a charge which leaves it to the jury is properly refused.

4. *Self-defense; charge as to.*—A charge asked, invoking the doctrine of self-defense, but ignoring the question of provocation by the defendant, which there is evidence tending to establish, and also ignoring the question whether there were any other means of escape, is properly refused.

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5. *Reasonable doubt; charge as to.*—A charge asked, which claims an acquittal “if the jury have a doubt about the defendant’s guilt,” is properly refused: only a reasonable doubt justifies an acquittal.

FROM the Circuit Court of Etowah.

Tried before the Hon. JAMES AIKEN.

The defendant in this case, James Jones, was indicted for an assault with a pistol on one William Croft, with the intent to murder him; was tried on issue joined on the plea of not guilty, found guilty as charged in the indictment, and sentenced to hard labor for the county for the term of two years. On the trial, as appears from the bill of exceptions, the evidence showed that the difficulty between the parties occurred under these circumstances: The defendant and one Bulger were playing a game of cards in an open field, and Croft was sitting near them. The defendant had put up his pistol against nine dollars as the stakes, and the pistol was lying between them. Croft made some remark about the game, and the defendant told him to “keep his mouth shut,” or to “keep his mouth out of the game.” Some other words then passed between them, when each attempted to seize the pistol; the defendant getting hold of the handle, and shooting Croft in the leg. Some of the witnesses testified, that Croft was advancing on the defendant when the latter fired; and the defendant, testifying as a witness for himself, stated that “he had retreated into a brier-patch ten or twenty feet before he jerked the barrel of the pistol out of Croft’s hands, and thereupon Croft drew his pocket-knife, opened it, and started towards him.”

This being the substance of the evidence, the defendant requested the following charges in writing: (1.) “Before the jury can convict the defendant, they must believe from all the evidence, beyond a reasonable doubt, that he intended to kill William Croft, without legal excuse or provocation.” (2.) “If the jury believe, from the evidence, that the defendant had a legal excuse for shooting Croft, then they must acquit him.” (3.) “If the jury believe, from the evidence, that at the time of the shooting Croft was advancing on the defendant, with an open knife in his hand; and that it made the impression upon the defendant’s mind that his life was in danger, or that he was in danger of great bodily harm; then they must acquit the defendant.” (4.) “Before the jury can convict the defendant, they must believe from all the evidence, beyond a reasonable doubt, that the defendant shot said Croft unlawfully, and with malice aforethought; and if they have a doubt about the defendant’s guilt, they must acquit him.” The court refused each of these charges, and the defendant excepted to their refusal.

JAMES L. TANNER, for the appellant, cited the following cases:  
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*Meredith v. The State*, 60 Ala. 441; *Simpson v. The State*, 59 Ala. 1; *Washington v. The State*, 53 Ala. 29; *Cross v. The State*, 63 Ala. 40; *Eiland v. The State*, 52 Ala. 322; *Lewis v. The State*, 51 Ala. 1; *Rogers v. The State*, 62 Ala. 170.

THOS. N. McCLELLAN, Attorney-General, for the State, cited *Bryant v. The State*, 76 Ala. 55; *McDaniel v. The State*, 76 Ala. 7; *Henderson v. The State*, 77 Ala. 77; Thompson on Charging Juries, 2.

STONE, C. J.—The defendant was indicted for an assault with intent to murder William Croft. Under that indictment, he might have been acquitted of the higher offense, which under our statute is made a felony, and convicted of the lesser offense, an assault, or assault and battery. The testimony was not in harmony, but none of it exonerated the defendant from all blame in provoking, or bringing on the difficulty. This is always a material inquiry, when self-defense is relied on. It is an important factor; for circumstances which would fully establish self-defense, if unimpaired by provocation given, are often rendered impotent, if the person setting up the defense himself provoked or brought on the difficulty.—*DeArman v. The State*, 71 Ala. 351; *Storey v. The State*, *Ib.* 329.

The first charge asked ignores the minor degree of the offense, and demands an acquittal on evidence which, at most, only requires an acquittal of the felony. An intent to kill may, perchance, not have been proved beyond a reasonable doubt, and yet the assault so clearly established as to require a conviction of the misdemeanor. This charge is also obnoxious to the criticism we make on the second charge.—*Bryant's case*, 76 Ala. 33.

The second charge is faulty, in that it proposes to leave it for the jury to determine what would be a "legal excuse" for the shooting. What would justify or excuse one man in shooting another, is a question of technical, legal learning, which should be defined by the court, and not left to the jury.

The third charge asked is faulty in two respects. It ignores the question of provocation given by the accused, and it equally ignores all other means of escape.—*Lewis v. The State*, 51 Ala. 1; *Eiland v. The State*, 52 Ala. 322; *Cross v. The State*, 63 Ala. 40; *Mc Neezer v. The State*, 63 Ala. 169.

The fourth charge was properly refused, if for no other reason, for the following clause contained in it: "and if they [the jury] have a doubt about the defendant's guilt, then they must acquit the defendant." A mere doubt does not require an acquittal. It must be a reasonable doubt. *Mose v. The State*, 36 Ala. 211.

The judgment of the Circuit Court is affirmed.

## Shackleford v. The State.

### *Indictment for Attempt to Poison.*

1. *Sufficiency of indictment in description of poisonous substance.*—An indictment for an attempt to poison must allege that the drug, or other substance administered, was a deadly poison, or such as was calculated to destroy human life; and the better practice is to specify the name of the drug, or other substance, or that it was unknown.

2. *Change of venue; when application must be made.*—An application for a change of venue, in a criminal case, is required to be made “as early as practicable before the trial” (Code, § 4911); and it comes too late when made after several postponements of the case, after an application for a continuance has been overruled, after the witnesses have been sworn and put under the rule, and after the solicitor has expressed himself satisfied with the jury.

3. *Threats against third person; admissibility of.*—The prosecution having proved the defendant’s threats to kill the person whom he is charged to have attempted to poison, which threats were made to a woman with whom each of them had an illicit connection, it is permissible to prove his threats, made in the same conversation, to kill the woman also.

4. *Charge ignoring proof of time and place.*—A charge is misleading, if not erroneous, which authorizes the jury to find a verdict of guilty without any consideration of the evidence as to the venue, or as to the time when the offense was committed.

FROM the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

The second count of the indictment in this case, on which alone the defendant was tried and convicted, charged that the defendant, J. B. Shackleford, “unlawfully attempted to poison Coon Penn, in this, that he, the said defendant, did unlawfully, and with malice aforethought, administer to, and cause to be taken by the said Coon Penn, a poisonous drug, with the intent then and there felonously to kill and murder the said Coon Penn, against the peace,” *etc.* The defendant demurred to this count, and, after conviction, moved in arrest of judgment on account of its alleged insufficiency; but his demurrer and motion were overruled. He also made an application for a change of venue, which was refused, and excepted to the refusal. This application, the bill of exceptions states, “was made on the 17th of March, after the case had been called on the 6th, when it was passed to a future day, again called for trial, and again on two occasions passed on request of the defendant, he being present in person and by counsel; and when finally called, on the afternoon of March 17th, defendant again

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moved the court to continue the cause; and after the court refused to again pass or continue the cause, and the witnesses on both sides had been sworn and put under the rule, and the solicitor had passed on the jury."

On the trial, issue being joined on the plea of not guilty, the State introduced evidence tending to show that the defendant had kept up an illicit intercourse for a year or two with a woman called Eliza Barnett, with whom he also boarded; that Coon Penn also boarded at her house, and was criminally intimate with her; that the defendant became jealous of Penn's attentions to the woman, and insisted to each of them that he should leave the house; and that on or about the 10th of February, 1886, before the finding of the indictment, he administered to said Penn a quantity of strychnine in a drink of whiskey. Said Eliza Barnett was introduced as a witness on the part of the State, and testified that the defendant came to see her one night, a short time before the strychnine was administered to said Penn, and had a conversation with her, "in which he said that he would kill said Penn, if he did not quit boarding with her; and that afterwards on the same night, while further making known to her his objections to said Penn's boarding with her, he said that he would kill her." The defendant objected to the admission of this evidence as to the threat to kill the woman, and excepted to the overruling of his objection.

The court gave the following charges to the jury, on the request of the prosecution: (1.) "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully attempted to poison Coon Penn, as charged in the second count of the indictment, then they must find the defendant guilty." (2.) "The jury must determine the guilt or innocence of the defendant from all the evidence." (3.) "The jury can not capriciously reject the testimony of a witness, but the weight to be given to the evidence must be determined by them after looking at all the circumstances." The defendant excepted to each of these charges.

HEWITT, WALKER & PORTER, for appellant, cited *Clarissa v. The State*, 11 Ala. 57; *Anthony v. The State*, 29 Ala. 27; *Salomon v. The State*, 27 Ala. 27; *Huffman v. The State*, 28 Ala. 48; *Bain v. The State*, 61 Ala. 75; *Gooden v. The State*, 55 Ala. 178.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The indictment is under section 4314 of the present Code (1876), which makes it a felony for one to



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“attempt to poison any human being, or to commit murder by any means not amounting to an assault.”

Under the authority of the previous decisions of this court, we hold that the indictment should have stated that the drug alleged to have been administered was a deadly poison, or such as was calculated to destroy human life.—*Anthony v. The State*, 29 Ala. 27; *The State v. Clarissa*, 11 Ala. 57.

The better rule, moreover, is for the indictment to specify the name of the poisonous drug used in the attempt, or, if it be unknown to the grand jury, to so allege. That this is necessary, however, we do not now decide.—Bishop on Stat. Crimes, (2d Ed.) §§ 756–757; Bishop's Directions and Forms, §§ 138, 213; 2 Bishop's Crim. Proc. (3d Ed.), §§ 644–648, 553, 514; *Carter v. The State*, 2 Ind. 617. For this defect, this judgment must be reversed, and the cause remanded.

The application for a change of venue was properly refused. The statute requires that such an application should be made “as early as practicable before the trial.”—Code, 1876, § 4911. Nor is this changed in any manner by the recent statute authorizing this court to review and revise the action of the primary court in refusing to grant such application.—Acts Ala. 1884–85, p. 140.

The record shows that the presentation of the motion for a change of venue in this case was unreasonably delayed. The cause was called for trial on three separate occasions between the sixth and seventeenth of March, and was each time passed at the request of the defendant, when an application was made to continue the cause, which was refused. And finally, when the application relating to venue was made, it was after the witnesses on both sides had been sworn and put under the rule, and the solicitor had expressed himself satisfied with the jury. *Wolf v. The State*, 49 Ala. 349; Code, § 4911.

There was no error in admitting in evidence the threat of the defendant to kill the witness Eliza Barnett, it being a part of the same conversation in which he had made a similar threat against Coon Penn—the person whom he was charged with attempting to poison. The witness was shown to be the paramour of both the defendant and of Penn, and it was not unnatural that jealousy should have prompted the injury of the rival in her illicit affections, as well as of the paramour herself. Threats against her were, under the circumstances, relevant to show the intensity of the defendant's malice towards Penn; and the threat made by him to kill the witness Eliza Barnett may have originated in a common motive of malice in view of her alleged illicit relations towards Penn. There was no error, therefore, in admitting evidence of the threat as testified to by this witness.

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The charges given by the court, at the request of the State, were obviously correct, except the first, which was misleading, if not erroneous, in ignoring the consideration by the jury of any question as to the time when the offense was committed, and the matter of venue.

The judgment is reversed, and the cause remanded. The prisoner, in the meanwhile, will be held in custody until discharged by the due course of law.

## Harrison v. The State.

### *Indictment for Murder.*

1. *Challenge of juror having fixed opinion against capital or penitentiary punishment, and waiver of right.*—The State may challenge for cause a person summoned as a juror, in a case which may be punished capitally or by imprisonment in the penitentiary, who states that he thinks a conviction should not be had on circumstantial evidence (Code § 4883); but the right of challenge on that ground is not extended to the defendant, nor can he complain of the waiver of the right by the State.

2. *Threats by defendant; admissibility as evidence.*—Threats made by the defendant against the deceased, or against a class to which the deceased belonged, and *prima facie* referable to him, though his name was not mentioned, are competent and admissible as evidence against him, and it is for the jury to determine whether they, in fact, had reference to the deceased.

3. *Charge asked and refused, but not shown to have been asked in writing.*—Charges asked and refused must be shown to have been asked in writing, else this court will presume that they were not in writing, and were refused on that account.

FROM the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

The defendant in this case, Noah Harrison (or Harris), was indicted for the murder of Abe (or Adolph) Anthony, by shooting him with a pistol; was tried on issue joined on the plea of not guilty, convicted of murder in the second degree, and sentenced to the penitentiary for the term of ten years, as on the former trial.—78 Ala. 5. In the organization of the jury, as the bill of exceptions states, “a number of persons were called as jurors, who said they would not convict on circumstantial evidence, and who were, on that account, challenged for cause by the State. Another juror was afterwards called, who said that he would not convict on circumstantial evidence; but the State, against the objection of the defendant, waived this cause of challenge, and the court forced the

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defendant to pass upon the juror; to which the defendant excepted, and challenged the juror."

The bill of exceptions states that "the evidence was conflicting, and the witnesses contradicted each other;" but it does not purport to set out all the evidence. The killing occurred on a Tuesday night, at a church which the parties attended, the deceased being in company with one Henry Allen, and the defendant with Ben McCall. "The testimony showed that the defendant and the deceased never had any difficulty with each other, and, in fact, were not even acquainted with each other, prior to the time of the killing; and there was no testimony showing that McCall ever had a difficulty with the deceased." But it was shown that a difficulty had taken place, a few nights previously, between the defendant and said Allen, at a "surprise party," as it is called; that Allen, in company with the deceased, saw the defendant on the street the next day, and pointed him out as the man with whom he had had the difficulty, or as "the man who had drawn a pistol on him at the surprise party;" and the evidence tended to show that the difficulty at the church was a renewal of the former quarrel, or grew out of it by the active instigation of McCall and the deceased as the friends of the defendant and Allen. The parties went out of the church during the services, and meeting on the pavement in front, as some of the witnesses testified, "as soon as Anthony touched the bottom step, Harrison shot him;" while others testified, that, after using abusive words to each other, "Harrison ran down the steps, pursued by Anthony, who put his hand to his pistol-pocket behind, and called on two men to stop Harrison; and that he was in the act of cocking his pistol, saying, '*I have got you now,*' when Harrison wheeled and fired." The State introduced several witnesses, who were allowed to testify, against the objections of the defendant, to declarations or threats made by the defendant, as follows: Alice Fleming testified, that she heard the defendant, on the afternoon of the Sunday on which the killing occurred, say to another negro man, whom she did not know, "*Didn't get him last night; we will get him to-night.*" Jeff Wesley stated, that he heard the defendant say to another negro man, on that Sunday morning, "*I am going to take my pop with me to-morrow morning, and if I meet him, I will give him the contents of it.*" Amelia James, that on the Friday night before the killing, she heard the defendant say to another person, "*If you call him out, I'll crack down on him,*" she being then separated from them by a thin partition. Henry Benoit, that he heard the defendant say, on Sunday before the killing, "*There was one Mobile son of a b— he was going to kill.*" To the admission of these several threats as evidence the de-



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defendant objected, because it was not shown that they had reference to the deceased, and because they were otherwise irrelevant and illegal; and he duly excepted to the overruling of his several objections.

"The defendant asked the court to charge the jury as follows: 'It is the duty of the jury to reconcile all the evidence, if they can, with the theory that all the witnesses have spoken truly in every respect; but, if they find that there is a conflict in any portion of the evidence, and, upon the consideration of the whole evidence, entertain a reasonable doubt of the truth of that evidence, they should give the defendant the benefit of that doubt; if the evidence about the truth of which they entertain a reasonable doubt is favorable to the defendant, they should give him the benefit of that doubt, and treat that portion of the evidence as true; and if such portion is adverse to the defendant, they will still give him the benefit of the doubt, and discard such evidence from their consideration.' The court refused to give this charge, and the defendant excepted."

L. B. SHELDON, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—That a person, summoned and called as a juror on the trial of an offense which may be punished capitally, or by imprisonment in the penitentiary, thinks that a conviction should not be had on circumstantial evidence, is made by statute a good cause of challenge *by the State*; but the right is not extended to the defendant, and may be waived by the State. By electing to challenge one or more persons for such cause, the State is not estopped from waiving the same cause of challenge as to any person who may be subsequently drawn as a juror. The defendant has no cause of complaint, if the State forbears to exercise the right to challenge any juror for the cause mentioned.—Code, § 4883; *Murphy v. State*, 37 Ala. 142.

Evidence of threats made by the accused is admissible to show his *animus* at the time of committing the offense. To be admissible, they must indicate a purpose to do some particular persons an injury, or must be expressions of ill-will or hate towards a class, of which the deceased is one; and must be capable of such construction as to show reference to the deceased. Where the threats are capable of being so construed, considered in connection with the other evidence, although no particular person is specially designated, and are not so far removed from the inquiry involved in the issue before the jury as to give no aid or direction in determining that issue, they

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are admissible ; and their reference to the deceased is a question for the jury, to be determined on the whole evidence. The bill of exceptions does not purport to set out all the evidence ; and in such case, every reasonable intendment in favor of the ruling of the court will be indulged. The threats, to which objection was made, fall within the rule of admissibility, their reference to the deceased being left to the consideration of the jury.—*Ford v. State*, 71 Ala. 385 ; *Jones v. State*, 76 Ala. 8.

The record does not show that the charge requested by the defendant, and refused by the court, was asked in writing. The court is not required to give any charge, not requested in writing ; and we will not presume the charge was in writing, in order to put the court in error. This fact not appearing, we can not consider the charge, even if it be conceded that it asserts a correct legal proposition, as to which we express no opinion.—*Winslow v. State*, 76 Ala. 42.

Affirmed.

## Hull v. The State.

### *Indictment for Assault with Intent to Murder.*

1. *Variance in character of weapon used.*—Under an indictment which charges an assault with a razor, a conviction may be had on proof of an assault with a pocket-knife: the two instruments being of the same kind, and the character of the wounds inflicted being substantially the same, the variance is immaterial.

2. *Self-defense; charge as to.*—A charge asked, which bases the defendant's right to an acquittal on his reasonable apprehension of an assault, ignoring a real or apparent danger to life or limb, and also the question of retreat, is properly refused.

FROM the Circuit Court of Cherokee.

Tried before the Hon. JAMES AIKEN.

The indictment in this case charged that the defendant, June Hull, "unlawfully and with malice aforethought did assault James B. Thompson with a razor, with the intent to murder him." On the trial, as appears from the bill of exceptions, said Thompson testified on the part of the State to the facts attending the difficulty between himself and the defendant, which occurred while they were driving along together, with one Gus Wright, the defendant behind, and Thompson in front ; and he stated that, after some angry words had passed between them, as he turned around towards the defendant, the

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latter cut him in the neck with a razor. The defendant, testifying as a witness for himself, stated that, as Thompson turned around towards him, putting his hand on or towards his hip pocket, he cut at said Thompson with an old pocket-knife, but did not know whether he cut him or not; and that he had no razor about him at the time. The statement of said Wright, which was admitted in evidence as his testimony, he being absent, was substantially the same as that of the defendant, as to the circumstances of the difficulty, and as to the weapon used. On this evidence, the court charged the jury, in substance, that it was immaterial whether the weapon used was a razor or a pocket-knife; and refused the following charge, which was asked by the defendant in writing: (2.) "If the jury believe, from the evidence, that the assault, if any, was made under a reasonable apprehension of an assault by said Thompson on the defendant, and to protect himself from an attack by said Thompson, then they must find the defendant not guilty." The defendant excepted to the charge given, and to the refusal of the charge asked.

CLOPTON, J.—The indictment charges, that the assault was made with a razor. There was evidence tending to show that the wound was inflicted with a pocket-knife. The court, in the general charge, instructed the jury, in substance, that it was immaterial whether the assault was made with a razor or a pocket-knife; and refused to charge, at the request of defendant, that if the jury had a reasonable doubt as to the assault being made with a razor, they must acquit the defendant. It is sufficient, if the substance of the charge be proved, without regard to the precise instrument used. Though the indictment charges a particular weapon, the averment is substantially proved, if it be shown that some other instrument was employed, which occasions a wound of the same kind as the instrument charged, and the same consequences naturally follow. *State v. Fox*, 1 Dutcher, 566; *State v. Smith*, 32 Me. 369; *Rogers v. State*, 50 Ala. 102; 1 Bish. on Crim. Proc., § 514; 1 Arch. Cr. Pr. & Pl. 787.

The second charge requested by defendant, was properly refused. It predicates the right of defendant to an acquittal on the mere fact of a reasonable apprehension of an assault; and ignores a real or apparent danger to life or limb, and the doctrine of retreat.—*Prior v. State*, 77 Ala. 56; *Henderson v. State*, 77 Ala. 77.

Affirmed.



## Allen v. The State.

### *Indictment for Forgery.*

1. *Forgery of receipt.*—A receipt for money paid on account is an instrument in writing by which a pecuniary demand purports to be discharged or diminished, and is the subject of forgery in the second degree (Code, § 4340), if falsely forged or altered with intent to defraud.

2. *Same; alteration of date.*—The alleged forgery being an alteration in the date of a genuine receipt, by changing 1882 to 1884, it can not be assumed, on demurrer to the indictment, that the alteration was immaterial, as increasing one demand to the same extent it purported to diminish another; but, if the evidence showed that in fact the existing indebtedness was not diminished, the payment being simply transferred from one debt to another, this would be pertinent to the inquiry whether there was an intent to defraud.

3. *Proof of suits without production of record.*—It being shown that the altered receipt was introduced as evidence by the defendant on the trial of an action on an attachment bond, which he had instituted against the person whose name was signed to the receipt, and who had sued out an attachment against him; the actions at law being collateral to the issue, it is not necessary that the records thereof should be produced before a witness can be allowed to testify in regard to them.

4. *Witness testifying to his examination before grand jury.*—There is no error shown in allowing the prosecutor to testify to the fact that he was examined as a witness before the grand jury, since such evidence may sometimes be material, or it may have been introduced as merely preliminary to something else.

5. *Amendment of verdict.*—When the verdict of the jury is not in proper form, the court may inform them of the defect, before they are discharged, and instruct them to retire and consider further of it; and the defendant can not complain of this action.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The defendant in this case was indicted for the forgery of a receipt, to which the name of W. V. Bell was signed, and which was in these words: “\$220.18. Received of Jack Allen two hundred and twenty dollars and eighteen cents, on his account, this Sept. 15, 1884.” The second count of the indictment charged that, before the finding thereof, “Jack Allen did falsely, and with intent to defraud, forge a receipt for the payment of money, purporting to” [be] “the act of one W. V. Bell, by which a pecuniary demand purported to be discharged or diminished, and which is in words and figures as follows,” setting it out; “the said forgery consisting in the changing of the date of said receipt from the year 1882 to the year 1884.” The defendant demurred to this count, because

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of the omission of the word *be*, shown above by the brackets; and because it charged no offense; and because its averments were inconsistent and repugnant; and because the instrument set out did not purport to discharge any pecuniary demand; and because it did not aver or show that the alteration was material. The court overruled the demurrer, and the cause was tried on issue joined on the plea of not guilty.

On the trial, as the bill of exceptions shows, the execution and alteration of the receipt having been proved by said W. V. Bell, the court admitted it as evidence under the second count, and the defendant excepted to its admission. "The State asked said Bell, if he was a witness before the last grand jury of this court; and the court allowed the question to be asked, as stated, for the purpose of allowing the time of the alleged forgery to be fixed; to which action and ruling of the court the defendant objected and excepted." The prosecution adduced evidence showing that said Bell had sued out an attachment against the defendant; that the defendant afterwards brought an action on the attachment bond; that on the trial of that suit he, through his attorney, introduced in evidence the said receipt alleged to have been altered; and that all these matters "took place in said county, within the time covered by the indictment." The defendant moved the court "to exclude from the jury the evidence in reference to the attachment suit, and the suit on the bond, and the issues therein, on the ground that the records should be introduced, as better evidence thereof;" and he excepted to the overruling of his motion. The defendant, testifying as a witness for himself, stated that he did not alter the date of the receipt, nor procure its alteration by any one else, and that he could neither read nor write.

The jury returned a verdict in these words: "We, the jury, find the defendant guilty in the second degree." When the verdict was read by the clerk, the court called their attention to its informality, "and directed then to correct it; and they thereupon took the papers, and, having retired for a few minutes," returned a verdict in these words: "We, the jury, find the defendant guilty of forgery in the second degree." To the action of the court in permitting the jury to amend their verdict the defendant excepted at the time.

MOORE & FINLEY, for the appellant.—(1.) The indictment was fatally defective in several particulars, as pointed out in the demurrer. The receipt does not purport to discharge any pecuniary demand; nor does it appear on its face, or by the averments of the count, that the alteration of the date was material. *Prima facie*, the alteration was wholly immaterial,

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merely diminishing one debt as it increased another; and the evidence entirely fails to show how it became material. 2 Bish. Cr. Law, § 573; 2 Bish. Cr. Proc., § 416; 2 Abb. Law Dic. 385; 2 Leach, C. C. 672, 753; *Rembert v. State*, 53 Ala. 467. The word *be*, omitted from the indictment, was material, and its omission can not be cured by intendment. *Roundtree v. State*, 58 Ala. (2.) The records of the attachment suits, or the original papers if no record had been made up, were the best evidence of the facts to which the witnesses were allowed to testify, and ought to have been produced. (3.) The verdict, as at first returned, was fatally defective, and was equivalent to an acquittal; and the court ought not to have permitted it to be changed.

THOS. N. McCLELLAN, Attorney-General, for the State, cited the following authorities: *Jones v. State*, 50 Ala. 160; *Thompson v. State*, 49 Ala. 16; 53 Ala. 467; *Horton v. State*, 53 Ala. 491; Clark's Manual, 90, § 536; *Allen v. State*, 52 Ala. 391.

STONE, C. J.—The indictment in this case was framed under section 4340 of the Code of 1876, and contains two counts. The offense, if sufficiently averred, is forgery in the second degree. There was a demurrer to each count, which the City Court overruled. The paper set out in each count is, in form, a receipt for money, paid on account by Jack Allen, to W. V. Bell. The offense charged is, that Jack Allen did falsely forge said instrument, with intent to defraud; and in each count it is averred, that by such instrument, so alleged to be forged, a pecuniary demand purported to be discharged or diminished. Our statutes permit this alternative, or disjunctive form of averment.—Code, § 4797. And if either one of the intents or results charged be shown—all being alike criminal—this will sustain both the indictment and the conviction. The offense is complete, and of equal criminality, whether the instrument alleged to have been forged purported to discharge in full, or only to diminish a pecuniary demand. A copy of the receipt is set out *in hæc verba*; and its necessary purport and implication are, that Allen was, at the date of the receipt, indebted to Bell on account, and that by the receipt the indebtedness was diminished, or acknowledged to be diminished, by the sum expressed in the receipt. Any false making, or alteration of such a paper, in the name of another, purporting to produce this result, if done with intent to defraud, is forgery in the second degree; and the jury, under proper instructions, are judges of the intent.—*Thompson v. State*, 49 Ala. 16; *Rembert v. State*, 53 Ala. 467; *Allen v. State*, 74 Ala. 557;



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*Baysinger v. State*, 77 Ala. 63. Nor is there anything in the omission of the word "be" in the second count. The context supplies it.

What we have said above demonstrates, that the City Court did not err in refusing to give the charge asked by the defendant. If the receipt was intended to diminish a pecuniary demand, that is as much a violation of the statute, as if the intention was to discharge it altogether.

There was a demurrer to the second count of the indictment, assigning as one of the grounds, "that said count is insufficient in not showing wherein the alteration of the date of said receipt was material." The second count, after charging that defendant "did falsely, and with intent to defraud, forge a receipt for the payment of money, purporting to (be) the act of one W. V. Bell, by which a pecuniary demand purported to be discharged or diminished," contains a copy of the receipt as it appeared after the alleged alteration was made, and adds, "the said forgery consisting in the changing of the date of the said receipt from the year 1882 to the year 1884."

Section 4340 of the Code of 1876, as amended by act approved January 27, 1883—Sess. Acts, 33—defines the offense for which defendant was prosecuted. Each count of the indictment contains every material ingredient of this statutory crime. No form of indictment for this species of forgery is given in the Code. The nearest analogy, perhaps, is found in forms 49 and 52, p. 997 of the Code. The indictment is sufficient in form.—Code, §§ 4799, 4824.

It is urged, in support of the demurrer, that the alteration of the receipt set out in the second count, and charged to be the forgery complained of, does not, on its face, appear to be material. We can not assent to this. As we said above, the implications of the receipt are, that Allen was indebted to Bell by account, and that Bell acknowledged the payment of the sum of two hundred and twenty dollars on that account. Indebted and partially paid, when? Evidently at the date of the receipt as altered, 1884. Here, then, according to the face of the paper, was evidence that Bell held a pecuniary demand against Allen in September, 1884, on which the latter obtained a credit of that date, diminishing the debt or liability by the sum of two hundred and twenty dollars. This was the purport of the paper; and thus the case charged is brought directly within the statute, if the intent was to defraud; and whether such was the intent, was for the jury to inquire.

Without explanation, it is no answer to this implication or purport, that the paper, as originally drawn and signed by Bell, proved an indebtedness in 1882, and a corresponding diminution of that indebtedness by the sum expressed in the

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receipt. Diminution of one indebtedness, is not necessarily an enlargement of the other. If we could assume that the indebtedness of 1882 still existed, or constituted a part of the indebtedness of 1884 as one continuing pecuniary demand, and that the alteration of the date was only a transfer of the credit from one date to a later one, then, indeed, the alteration would seem to be immaterial. But we can make no such assumption. The transaction charged, and the altered receipt on its face, purport to diminish an indebtedness in 1884, and there is nothing to raise the presumption that it increased the indebtedness of 1882 by a corresponding amount. We can not presume the indebtedness of 1882 still existed. For aught that we can know, or presume, that indebtedness had been cancelled, allowing Allen the benefit of the payment, of which the receipt furnished the evidence, and a second use was attempted to be made of it, in part payment, or diminution of the pecuniary demand of 1884. The possession of the receipt by Allen does not militate against this. Receipts for partial payments need not be, and are not usually taken up, when final settlement is made. So we hold, that there is nothing on the face of the indictment to repel, or weaken the implication, that the receipt as alleged to be altered diminished a pecuniary demand, and the demurrer was rightly overruled.—*Rex v. Hope*, 1 Moody, 414.

If it had been shown in proof that the alleged alteration did not in fact diminish the indebtedness from Allen to Bell, but simply transferred the payment from one debt to another, this would have been pertinent testimony on the inquiry whether there was an intent to defraud. No ruling of the court brings that question before us.

The testimony tends to show that Bell had sued out an attachment against Allen, the defendant in this case, and that Allen had sued on Bell's attachment bond; which latter suit had been tried, and Allen testified as a witness on the trial. The receipt, the subject of the alleged forgery, was admitted on all hands to be genuine, except as to date. Bell testified that the true date of the receipt, as given by him, was 1882. It was produced on the trial of the suit on the attachment bond, and purported to be dated in 1884. The sole purpose for which evidence of the two civil suits was offered, was to lay a predicate for, and furnish an introduction to the testimony of Jack Allen, given in the suit on the bond. The testimony tended to show that, in his evidence on the trial of that suit, Allen produced the receipt in its present form, and claimed that it truly represented a payment made by him in 1884. The material bearing of this testimony was, that it tended to prove that Allen uttered the paper as true, which was an in-

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portant circumstance in determining whether he was concerned in its alteration, if altered it was. The trial in which he gave testimony was not a material fact in this case, for the asserted right under the receipt would have been equally potent under the inquiry of forgery *vel non*, if it had been deliberately made under different circumstances. The trial and judgment, even if proved by the record, could have exerted no influence in the determination of the issue before the jury in this case. It was the mere accident of the case, describing the occasion on which the instrument, alleged to be fraudulently altered, was uttered. The attachment suit, and the suit on the bond, were not in issue in this case. They came up collaterally; or, correctly speaking, they had nothing to do with the case. The utterance as true was the material fact; the suits, the accidental accompaniment. This is not a question of primary and secondary evidence, but simply the proof of an accidental, or collateral fact. The City Court did not err in allowing the witness to speak of the suits, without the production of the records.—1 Green. Ev. § 573 *b*; 1 Brick. Dig. 849–51, §§ 638, 659, 665, 681, 686, 753; *Graham v. Lockhart*, 8 Ala. 9; 1 Whar. Ev. § 64.

Nor did the City Court err in allowing the witness Bell to testify that he had been examined as a witness before the grand jury. Of itself, this proved nothing hurtful, and may have been introduced merely as a reminder, or stepping-stone, to the subject about which he was called to testify. There are many possible categories, in which such inquiry would become necessary, or, at least, proper.

The verdict, when first returned by the jury, was imperfect. The court informed them of the imperfection, and instructed them to retire and consider further. This they did without having dispersed, and without having been discharged. The court in this only did its duty.—*Allen v. State*, 52 Ala. 391.

Affirmed.

## Floyd v. The State.

### *Indictment for Escape, and for Resisting Officer.*

1. *Appointment of minor as special constable.*—A minor is not eligible to the office of constable; but, when specially appointed by a justice of the peace to execute a particular process (Code, § 768), he is an officer *de facto*.

2. *Acts of officer de facto; resisting or escaping from him.*—An officer



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*de facto*, executing process placed in his hands, is entitled to the same protection that the law gives to an officer *de jure*; and a person who is indicted for resisting him, or escaping from him, can not be heard to question his appointment.

3. *Authority of arresting officer.*—If the arrested person, being brought by the officer into the presence of the magistrate, attempts to escape before the magistrate has taken any step, or made any order changing his legal *status*, he may be pursued and recaptured by the arresting officer without any new process.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

The indictment in this case contained two counts, the first charging that the defendant “willfully and knowingly resisted R. E. Morrill, a special constable, while executing a warrant of arrest issued by D. H. Workman, a justice of the peace;” and the second, that he “did willfully escape from the custody of said Morrill,” while in his custody as such special constable under said warrant of arrest. Being tried on issue joined on the plea of not guilty, the defendant was convicted under the second count of the indictment; and he brings the case to this court on points reserved by bill of exceptions during the trial.

The warrant of arrest issued by said Workman, which was offered and read in evidence on the trial, contained an indorsement in these words: “R. E. Morrill is authorized to execute this warrant.” Said Morrill, testifying on the trial as a witness for the prosecution, stated that “he arrested the defendant under said warrant, and carried him before said Workman, and made his return on the warrant; that said Workman then told defendant he would require a bond for his appearance later in the day, for a hearing; that defendant then proposed to witness, in the presence and hearing of said Workman, that he would go out and get a bonds-man, if witness would go with him; that thereupon, without the express order of said Workman, but with his knowledge, witness went out with defendant, taking the warrant from the justice’s table, with his knowledge, and putting it in his pocket; that they went several squares, but failed to find the man defendant wanted, and started to return to the justice’s office, when the defendant refused to go with him any further, and turned and walked off; that witness grabbed him, and tore his shirt, and went two squares with him, but, finding he could not stop him, left him, and went back to the justice’s office, and returned the warrant; and that defendant did not fight, nor make other resistance than as stated. Said Morrill testified, also, that he was, when appointed to arrest the defendant, between eighteen and nineteen years old. The defendant, testifying as a witness for himself, stated that he knew Morrill was under twenty-one years of age, and did not know that he had the warrant with him; that

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Morrill did not show it to him, nor tell him that he had it, after they left the justice's office."

"The defendant insisted, by his counsel, that said Morrill was not a legal officer, and could not be deputed, being under twenty-one years of age, and asked the court so to charge the jury; which charge the court refused to give, and the defendant excepted. The defendant asked the court to instruct the jury, also, that after Morrill had arrested him, and carried him before Justice Workman, the warrant was *functus officio*, and Morrill no longer had any authority by virtue of it. The court refused this charge, and the defendant excepted to its refusal. The court then charged the jury, that they could not, under the evidence, convict the defendant under the first count in the indictment, for resisting an officer; but, if they believed the evidence, they must find him guilty of an escape, under the second count. To this charge the defendant excepted. The court charged the jury, also, that said Morrill was, under the appointment of Justice Workman, a legal constable for the purpose of executing the warrant of arrest; and that he was such, under the law, at the time of the execution and return of the warrant as testified to; and that if they believed the evidence, as to what occurred when Morrill went with defendant to get a bonds-man, then defendant was guilty of a common-law escape, and they should so find. To this charge, also, the defendant excepted."

WILLIAMSON & HOLTZCLAW, for the appellant.—A minor is not capable of holding the office of constable.—Code, § 149. Being disqualified to hold the office, he was not a lawful officer, and the defendant was never in his lawful custody. Nor could a single act make him an officer *de facto*.—*Cary v. The State*, 76 Ala. 78. If the original arrest was lawful, the warrant had lost its force and efficacy when the defendant was arrested under it, and carried before the magistrate, subject to his order; and no new process being issued, the defendant was no longer in the custody of said Morrill. Nor, if lawfully in his custody, do the facts show an escape. Refusing to go further with the officer, if lawfully in his custody, is not an escape, since the officer may use necessary force.

THOS. N. McCLELLAN, Attorney-General, for the State, cited *Noles v. The State*, 24 Ala. 672; *Heath v. The State*, 36 Ala. 273; *Cary v. The State*, 76 Ala. 78; *Andrews v. The State*, 78 Ala. 483.

SOMERVILLE, J.—The special constable appointed by the justice of the peace was an officer *de facto*, although he was in-

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eligible to the position by reason of his minority. The justice was invested by statute with the authority to appoint in certain specified contingencies, and was the exclusive judge of their existence.—Code, 1876, § 768; *Noles v. The State*, 24 Ala. 672. The official acts of the special constable were, therefore, just as valid for all purposes as if he had been a legally appointed officer acting *de jure*, so far as the public and third persons were concerned.—*Cary v. The State*, 76 Ala. 78; *Joseph v. Carwithorn*, 74 Ala. 411; *Masterson v. Matthews*, 60 Ala. 260; *Heath v. The State*, 36 Ala. 273; *Mayor v. Stoneum*, 2 Ala. 390; *Sheehan's Case* (122 Mass. 445); s. c., 23 Amer. Rep. 374; *Hildreth v. McIntire*, 19 Amer. Dec., p. 63, NOTE; *State v. Carroll*, 9 Amer. Rep. 409.

The resisting of an officer *de facto*, or escaping from his custody, while under arrest, was as much a violation of law as if the officer were one *de jure*.—*Andrews v. The State*, 78 Ala. 483; 1 Bishop's Cr. Proc. (7th Ed.) § 464. If every culprit were permitted to collaterally assail the personal eligibility of officers of the law, while in their custody, by attempts to resist or escape from them, a most dangerous obstruction would frequently be raised to the orderly administration of justice.

The defendant was in the custody of the special constable at the time of his escape, the magistrate having taken no step, nor made any order, by which his legal *status* was changed. He had a right, therefore, to pursue and re-take the defendant, as a necessary means of preserving such custody of him.—Code, 1876, § 4672.

The rulings of the court fully accord with these principles, and the judgment is affirmed.

## Henry v. The State.

### *Indictment for Assault and Battery.*

1. *Conduct of prosecutor prior to assault; admissibility as evidence.* The difficulty between the defendant and the prosecutor, originating in a dispute about the latter's refusal to sell ice for a sick person, on request of a youth who was the defendant's cousin, having taken place in the afternoon; and it being shown that the prosecutor went, during the morning of that day, to the store of the defendant's father, to explain or talk about the matter; the fact that he was then angry and agitated, or his manner objectionable, is too far removed from the subsequent assault and battery to form a part of the *res gestæ*, and is not competent evidence for the defendant for any purpose.



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2. *Impeaching witness.*—As affecting the credibility of a witness, it is permissible to show that he entertains, or has expressed, feelings of sympathy or hostility towards the party by or against whom he is introduced, but not towards a third person who did not take part in the difficulty.

3. *Self-defense.*—If the defendant himself provoked the difficulty, or was instrumental in bringing it on, he can not set up the plea that he acted in self-defense.

FROM the Circuit Court of Etowah.

Tried before the Hon. JAMES AIKEN.

The defendant in this case, James F. Henry, was indicted for an assault and battery on James R. Nowlin, and, on being tried on issue joined on the plea of not guilty, was convicted, and fined \$50. "On the trial," as the bill of exceptions states, "the State introduced James R. Nowlin as a witness, who testified that, on the morning before the difficulty in the evening, he went to the store of Col. Sam. Henry, the father of the defendant, to see about a statement made by Walter Henry, his nephew, a cousin of the defendant, about witness' refusal to allow said Walter to have ice for the sick daughter of said Sam. Henry; that while at the store, said Walter not being there, Sam. Henry said he would send Walter down when he came; that witness replied, 'All right, you can do as you see proper about that;'; that afterwards, about four o'clock in the evening of that day, defendant came, with said Walter, to witness' store, and into the back room where witness was, and introduced Walter to witness, saying, 'I understand you wanted to see him about that ice;'; that thereupon witness and said Walter had a conversation about the ice, and then defendant and Walter started out of the room, witness following them; that as they got near the soda-fount, defendant said, 'This is the second time you have refused us ice for the sick;'; that witness replied, 'I thought that old matter was fully explained to your satisfaction;'; that defendant said, 'Yes, like this: in the first case, you put it on Stewart, your clerk, and now you put it on Moragne, your clerk; and I believe you did it on purpose;'; that witness and defendant were then walking side by side, defendant going in the direction of the door, and witness then stepped rather facing him, and said, 'That is not so, sir;'; that he did not know what the position of his hands was at the time; and that thereupon defendant said, 'That is a d—d lie,' and struck witness on the forehead. The defendant asked said witness, what was his manner, and the character of his voice and language, when he was at Henry's store in the morning; if he was not angry or agitated at the time; and if Col. Henry did not order him out of the store, in consequence of his manner and conduct." To each of these questions, the State objected, and the court sustained the objections; to which

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rulings exceptions were duly reserved by the defendant. Another witness for the State testified, "that both parties seemed willing to fight; that he (witness) caught hold of defendant, and asked him to stop; that the defendant did so, and went out of the store very quietly; that the parties were not hard to part, and the affair was very quiet."

On all the evidence adduced, which it is unnecessary to state in full, the defendant asked the court to charge the jury as follows: "If the jury have any reasonable doubt, as to whether the circumstances surrounding the defendant at the time he struck Nowlin were such as to cause the defendant to have any reasonable apprehension that it was necessary for him to strike Nowlin, in order to protect himself from Nowlin; then the jury must give the defendant the benefit of this doubt, and conclude that the surroundings were such as to produce a reasonable apprehension in the mind of the defendant." The court refused this charge, and the defendant excepted.

WM. H. DENSON, and WATTS & SON, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—The court did not err in excluding evidence of the manner and conduct of the witness Nowlin, and of his being angry and agitated, when at Henry's store in the morning of the day on which the rencontre occurred. It was too far removed, in point of time and place, from the subsequent battery, to constitute a part of the *res gestæ*; and was not admissible, either in extenuation or in justification.—*Rosenbaum v. State*, 33 Ala. 354; *Keiser v. Smith*, 71 Ala. 481. Neither was it admissible as affecting the credibility of the witness. While, for this purpose, it is admissible to show the feeling, whether of sympathy or hostility, which the witness may have, or may have expressed, towards the party by or against whom he is introduced, it is not competent to show that he entertained such feeling towards another person, who did not take part in the difficulty.

There was evidence tending to show that the defendant was instrumental in bringing on the combat. Any one who provokes, or is instrumental in bringing on a personal rencontre, is precluded to set up the plea that he struck in self-defense. "A provoked assault is no defense."—*Page v. The State*, 69 Ala. 229; 1 Whar. Crim. Law, § 628. Also, if the defendant did not provoke the rencontre, he must, in order to avail himself of the plea of self-defense, have avoided or declined the combat, if there was any reasonable mode of escape without endangering his safety. Each of the charges requested by

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defendant, ignored in its hypothesis both of these essential elements of the doctrine of self-defense; and for this reason was properly refused, without considering whether the rule is otherwise correctly asserted.

Affirmed.

## The State v. Posey.

### *Scire Facias against Bail.*

1. *Nature of proceeding; waiver of trial by jury.*—In *scire facias* against bail on a forfeited recognizance, which is a civil proceeding, the issue presented is required to be decided by the court (Code, §§ 4867-8); and if any issue can arise which would properly be determined by a jury, the failure to demand it is a waiver of the right.

2. *Discharge of sureties by order for new recognizance.*—When the principal defendant is required by the court to enter into a new undertaking of bail, because of the insufficiency of the first, and is ordered into custody for his failure to do so (Code, § 4862), the sureties are discharged for any future default.

3. *Presumption in favor of judgment.*—When the record does not set out the evidence on which the decision of the court below was founded, this court will presume that it justified the decision.

APPEAL from the Circuit Court of St. Clair.

Tried before the Hon. LEROY F. BOX.

The record in this case shows these facts: At the Spring term of said court, 1881, A. L. Posey was indicted for grand larceny, and was arrested under a *capias*. At the March term, 1883, he was tried and convicted, but the verdict was set aside on his motion, and a new trial granted; and it was further ordered, as the judgment-entry recites, "that the defendant remain in custody until discharged by due course of law." A memorandum by the clerk is then copied in the record, which states that "the defendant was afterwards released by the sheriff on the appearance bail-bond approved August 4, 1881, he having never given any other appearance bond in this case;" and further, "that afterwards, without request or otherwise of his bail, he was incarcerated by the sheriff in the jail of St. Clair county, and released on a subsequent day by the sheriff, without giving a new or additional bail-bond." The recognizance copied in the record, dated and approved August 4, 1881, is signed by A. L. Posey, Jno. W. Posey, and M. M. Posey; but the name of A. L. Posey only is inserted as an obligor in the body of the bond. At the September term,



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1883, said A. L. Posey having failed to appear, a conditional judgment was entered against him, and against John W. and M. M. Posey as his sureties. A *scire facias* on this judgment having been issued, and served on the sureties, they appeared, and pleaded, among other things, as follows: (3.) "If these defendants were ever legally bound on said bond, they have been discharged from liability by a compliance with the condition thereof, for that said A. L. Posey appeared at the Spring term, 1883, as provided by said bond, was duly arraigned, pleaded not guilty, was put upon his trial, and convicted of the offense with which he was charged, and incarcerated in the jail of said county, to await sentence; that on a subsequent day of said term of the court, said A. L. Posey was granted a new trial, and ordered held in custody until discharged by due course of law; that he was again incarcerated, in default of bond, and subsequently released from custody, without the consent of these defendants; and hence defendants aver that they have been discharged from all liability on said bond." The final judgment is in these words: "Comes the State, by her solicitor, and the defendants by attorney; and issues having been joined, it is considered by the court, that the issues are in favor of the defendants, upon their plea alleging their discharge, and therefore that the defendants go hence." The State appeals from this judgment, and here assigns it as error; and it is further assigned as error, that the judgment was rendered by the court without the intervention of a jury.

THOS. N. McCLELLAN, Attorney-General, for the appellant, cited *Hammons v. State*, 59 Ala. 164; *Ingram v. State*, 27 Ala. 17; *State v. Slack*, 6 Ala. 676.

INZER & GREENE, *contra*.—In the absence of a bill of exceptions, showing the evidence on which the court below acted, this court can not impute error to its judgment. After the defendant's surrender, trial and conviction, he was in the custody of the sheriff, and his release by that officer imposed no new liability on his old sureties.—Code, § 4847.

SOMERVILLE, J.—The proceeding is one by *scire facias* to make absolute a conditional judgment taken against the defendants, as sureties on a forfeited bail-bond. Such a proceeding is purely civil, and not criminal in its nature, being merely a suit for the recovery of money. The issue to be tried is the showing of cause why the judgment *nisi*, taken against the defendants at a former term, should not be made final. The statute provides that this issue, whatever may be the nature of

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the excuse for default, shall be heard and determined by the court.—Code, 1876, §§ 4867–68. If the court decide that the excuse is a good and sufficient one, the conditional judgment is set aside; otherwise, it is made absolute.—Code, § 4867. It does not seem to be contemplated that controverted issues of fact, arising in trials of this kind, will require the aid of a jury in their determination. The sufficiency of the excuse will often depend upon evidence which is conflicting, and yet it must be determined by the court.—*Dover v. State*, 45 Ala. 244, 254; *Hammons v. State*, 59 Ala. 164. Where issues are involved, however, other than the legal sufficiency of the principal's excuse for default, they would probably require the determination of a jury. However this may be, no objection was raised by the State, as plaintiff, in the court below, to the trial of the cause by the court, so far as appears from the record, and it is too late to raise such an objection for the first time in this court. The right of trial by jury is a privilege, which may be waived, in civil cases, by the consent of the parties litigant; and this seems to have been done in the present case, conceding that the right existed.

The judgment-entry shows that the issue decided in favor of the defendants was that raised by the third plea, averring the discharge of the defendants' liability as sureties by reason of the court's having taken and held their principal in custody and incarceration without the consent of the defendants. There is no demurrer to this plea. Nor is there any bill of exceptions setting out the evidence upon which the court acted in deciding the issue before it. It may be that the evidence disclosed the fact that the principal was required to enter into a new undertaking of bail, by reason of the insufficiency of the original one, and that he was ordered into custody for failure to comply with the order of the court.—Code, 1876, § 4862. The plea was broad enough to admit such an issue, in the absence of all objection to evidence supporting it. This would have operated to discharge the sureties from any future default. Our duty is to presume that, if the evidence had been disclosed, it would have sustained the ruling of the court.

Affirmed.

**Edmunds v. The State.***Indictment for Burglary.*

1 *Proof of foreign statute.*—To render a book self-proving, and admissible as evidence of foreign statutes, public or private, or of legislative proceedings (Code, § 3045), it must appear to be published, not only “by authority,” but by authority of the particular State, territory or government therein specified.

FROM the Circuit Court of Cherokee.

Tried before the Hon. JAMES AIKEN.

The indictment in this case charged, in a single count, that the defendant, with the intent to steal, broke into and entered a railroad depot, the property of the “East Tennessee, Virginia & Georgia Railroad Company, a body corporate incorporated under the laws of the State of Tennessee.” A trial being had, as the bill of exceptions shows, on issue joined on the plea of not guilty, the State proved the commission of the burglary as charged, by the testimony of an accomplice; “and, to prove the existence of the corporation to whom, as alleged in the indictment, the depot belonged, introduced and read as evidence, against the defendant’s objection, the following, purporting to be an act of the General Assembly of Tennessee, passed on the 17th December, 1869, and contained in a book which purported to be the statutes of the State of Tennessee passed by its legislature at the session of 1869–70; which said act is printed on page 45 of said book, and is in the words and figures following.” The act referred to is not set out, and the clerk certifies that he has not access to the volume mentioned; nor is the volume described, otherwise than as above stated. The defendant “objected to the admission of said act, because it did not show an act of incorporation;” and he duly excepted to its admission, as also to the refusal of a charge asked, which instructed the jury that there was no proof before them of the existence of such corporation.

WALDEN & SON, for appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—Section 3045 of the Code of 1876 provides that “public or private statutes, or the proceedings of any legis-



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lative body, purporting on the face of the book to be printed by authority of the government, state, or territory, are evidence without further proof." Construing this statute, we, in *Johnson v. The State*, 73 Ala. 483, held, that it was not enough that the book offered in evidence purported on its title-page to have been published "by authority." Our ruling was, that to be admissible in evidence, the book must purport to have been published *by the authority of the government*, by whose legislature the statute purports to have been enacted. To make such book self-proving, it must appear on its face, or title-page, to have been "printed by authority of the State."

The book offered and received evidence in this case falls far short of the one considered in Johnson's case. Taking all that is shown in the bill of exceptions as true, there is nothing which tends to show the State had any thing to do with the printing or publication of the book. It was not legal evidence of the act of incorporation.

Reversed and remanded.

## Coleman v. The State.

### *Indictment for Sale or Removal of Mortgaged Property.*

1. *Proof of conveyance.*—When there are two attesting witnesses to a mortgage, or other conveyance, its execution must be proved by one or both of them, unless the case is brought within some recognized exception to the general rule; and the admission of the mortgagor or grantor himself, not made *in judicio*, does not dispense with the necessity for this proof.

2. *Competency of donee or grantee as witness.*—A donee or grantee in a conveyance of property is not competent as an attesting witness to it; and if he signs it as one of the attesting witnesses, its execution can not be proved by him.

FROM the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

The indictment in this case charged that the defendant, Jake Coleman, "with the purpose to hinder, delay or defraud N. N. Clements, who had a lawful and valid claim thereto, under a written instrument, lien created by law for rent or advances, or other lawful and valid claim, verbal or written, did sell or remove personal property, consisting of one yoke of oxen and one wagon, of the value of over \$25; the said defendant having at the time knowledge of the existence of such claim." On the trial, as the bill of exceptions shows, issue having been

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joined on the plea of not guilty, the State introduced said N. N. Clements as a witness, who produced a mortgage for advances, under which he claimed the oxen, and which was signed by the defendant, and attested by E. R. Clements and J. H. McMahan as subscribing witnesses; neither of whom was offered as a witness, nor their absence accounted for. The court allowed said N. N. Clements to testify, against the objection of the defendant, "that Jake Coleman signed the mortgage in his presence, and has since admitted that he signed it;" and also allowed the mortgage to go to the jury as evidence, without further proof; and to each of these rulings the defendant reserved an exception. The defendant afterwards introduced Vinia Coleman as a witness, who was a daughter of the defendant, and who claimed the oxen as her own under a gift from a deceased uncle; and she produced a written instrument, which purported to be a deed of gift to her, and to which her own name was signed as one of three witnesses. On objection by the State, the court excluded the testimony of the witness as to this instrument, and also excluded the instrument itself; to which rulings the defendant excepted.

TALIAFERRO, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The admission of the mortgage in evidence was error. It purported to be attested by two subscribing witnesses, and its execution should have been proved by at least one of these witnesses, or else the witnesses should all have been shown to be dead, insane, out of the jurisdiction of the court, or that they could not be found after diligent inquiry; or the case should otherwise have been brought within some established exception to the rule, in either of which contingencies the instrument could be proved by other evidence. And the admission of the grantor in the mortgage, not made solemnly *in judicio*, did not dispense with the requisite proof. *Askew v. Steiner*, 66 Ala. 218; 1 Greenl. Ev., § 572.

The court properly excluded the written instrument purporting to be a deed of gift to Vinia Coleman, which was sought to be proved by the testimony of the donee. The donee was one of the three subscribing witnesses who attested this paper, and being incapacitated to be such a witness, by reason of being a beneficiary under the instrument, she was incompetent to prove it; and no other one of the attesting witnesses was offered for this purpose. No party to an instrument is a competent attesting witness to it, unless made so by statute; and this rule is not affected by the alteration of the former

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law made by section 3058 of the Code of 1876, which rendered parties and interested persons competent witnesses in certain cases.

We have examined the other rulings of the court, and believe them to be free from error. We do not understand that any objection is urged to them in the brief of appellant's counsel.

Reversed and remanded.

## Brown v. The State.

### *Indictment for Attempted Arson.*

1. *Averment and proof of ownership of house.*—In an indictment for arson, or attempted arson, the ownership of the building may be charged to be in A or B disjunctively (Code, § 4798); and if the evidence shows that it belonged to A, B and C jointly (Sess. Acts 1878-9, p. 46), the variance is immaterial.

2. *To what defendant may testify as witness.*—A defendant in a criminal case, testifying as a witness for himself, can not be permitted to testify as to his own uncommunicated motives or intentions; as, that he went into the basement of a building, where he was caught setting fire to some shingles, not for the purpose of setting fire to the building, but for the purpose of getting some whiskey.

FROM the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

The indictment in this case contained but a single count, which charged that the defendant "unlawfully attempted, willfully and maliciously, to burn the house of Fred Sloss or Macklin Sloss." After conviction, the defendant moved in arrest of judgment, on the ground that the indictment was fatally defective, and because it contained no sufficient averment of the ownership of the house; but the court overruled the motion. On the trial, as the bill of exceptions shows, issue being joined on the plea of not guilty, the State introduced evidence tending to show that, within twelve months before the finding of the indictment, the defendant went, in the night time, into the basement of a store-house which belonged to Fred Sloss, Macklin Sloss and Arthur Smith jointly, where, with other things, there was a barrel of oil, and ignited a match just above the barrel, and was in the act of setting fire to some pieces of shingle lying on the barrel, which was saturated with oil, when one Hugh Friel, who was in the basement, rushed out, and attempted to seize him; that the defendant ran away,



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pursued by Friel, and went into the house of one Reuben Davis, and got into bed with his clothes on, where he was soon arrested by said Friel. Said Friel was examined as a witness for the State, and testified to these facts; and said Reuben Davis, also examined as a witness for the State, testified to the defendant's declarations when he came into the house pursued by Friel; and he denied that he had said anything to the defendant that night "about going to the store after whiskey." One W. A. Brown, a witness for the defendant, "testified that said Reuben Davis told him, that he, Davis, had sent the defendant to said basement that night to get some whiskey, which he told defendant he had left there." The defendant, then testifying as a witness for himself, "testified that he went to the store that night to get some whiskey which Reuben Davis told him he had left there in the basement, and did not go for the purpose of setting fire to, or burning it." On objection by the State, the court excluded this evidence, and the defendant excepted. There was other evidence on the part of the prosecution, tending to show ill-will and threats on the part of the defendant against the owners of the building.

The defendant requested the following charges to the jury, in writing: (1.) "If the jury believe, from the evidence, that the store-house was the property of Fred Sloss, Macklin Sloss and Arthur Smith, and was owned by them jointly, then they must acquit the defendant." (2.) "In determining the guilt or innocence of the defendant, it is the duty of the jury to consider the defendant's own testimony; and if they believe, from the evidence, that he swore he went to the store to get some whiskey, it is the duty of the jury to consider such facts, so sworn to by defendant, in determining the guilt or innocence of the defendant." (3.) "In determining the guilt or innocence of the defendant, it is the duty of the jury to look to the defendant's own testimony; and if they shall believe, from the evidence, that the defendant swore he went to the store to get some whiskey, and not to set fire to or burn it, then it is their duty to consider such fact so sworn to by him, in determining the guilt or innocence of the defendant." (4.) "If the jury believe, from the evidence, that Reuben Davis told W. A. Brown that he sent the defendant to the basement of the store to get some whiskey, then they have the right to look to this statement, so made by said Davis to said Brown, not only for the purpose of contradicting said Davis, but also as a circumstance or fact tending to show that the defendant did in fact go into said basement to get some whiskey, and not to set fire to or burn said store." (5.) "If the jury believe, from the evidence, that said Davis told Brown that he sent the defendant into the basement of the store to get some whiskey, which he

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told defendant he had left there, then the jury have the right to look to this statement, so made by said Davis to said Brown, not only for the purpose of contradicting said Davis, but also as a circumstance tending to show whether the defendant went into the basement of said store to get some whiskey, or to set fire to or burn said store." The court refused each of these charges, and the defendant excepted to their refusal. The court then charged the jury, *ex mero motu*, "that the said statement of said Davis, if they believe it was made to said Brown, could only be looked to as tending to show whether said Davis was worthy of credit as a witness, and in determining the weight they should attach to his testimony in this cause; and in that way alone could the jury consider it, in determining the guilt or innocence of the defendant." To this charge the defendant excepted.

No counsel appeared in this court for the defendant, so far as the record and the dockets show.

THOS. N. McCLELLAN, Attorney-General, for the State, cited *Burke v. The State*, 71 Ala. 377; *Whizenant v. The State*, 71 Ala. 383; Sess. Acts 1878-9, p. 46.

STONE, C. J.—The indictment charges that the defendant attempted, willfully and maliciously, to burn a house.—Code of 1876, § 4348. To burn such house willfully is a misdemeanor, and an attempt willfully to burn it is also a misdemeanor. The indictment charges the ownership of the house to be either in Fred Sloss or Macklin Sloss. Such form of averment is permissible under our statute—Code, § 4798—and if either of the alternative averments be proved, this sustains the averment. The City Court did not err in holding the indictment good. *Ward v. The State*, 22 Ala. 16; *Johnson v. The State*, 35 Ala. 370.

The proof tended to show that the house was the property of Fred Sloss, Macklin Sloss and A. W. Smith. The statute, approved December 4, 1878 (Sess. Acts, 46), enacts, that "when any property, upon or in relation to which the offense was committed, belongs to several partners or owners, it is sufficient to allege the ownership to be in any one or more of such partners or owners." Under this statute, the variance between the averment and proof of ownership was immaterial. The first charge asked by defendant was rightly refused.

For the defense it was sought to prove by defendant himself, while giving his testimony, that he went to the house, not for the purpose of setting fire to it, but to get some whiskey. This was rightly ruled out. A witness, testifying for himself,

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is not permitted to give evidence of his own uncommunicated motives or intents.—*Burke v. The State*, 71 Ala. 377; *Whizemant v. The State*, *Ib.* 383; *Stewart v. The State*, 78 Ala. 436. Charges two and three were rightly refused, because each of them referred to this rejected testimony, as part of the hypothesis on which it was based.

In refusing charges four and five asked by defendant, and in the charge given by the court of its own motion, the City Court did not err. What the impeaching witness swore Reuben Davis had previously told him, was admissible solely for the purpose of impeaching Reuben Davis. For all other purposes it was unsworn hearsay.

The judgment of the City Court is affirmed.

## Cooper v. The State.

### *Indictment for Grand Larceny.*

1. *Recalling jury before verdict.*—It is discretionary with the court to recall the jury, after they have retired to consider of their verdict, for the purpose of explaining instructions already given, giving additional instructions, or admitting evidence of some fact overlooked during the trial; and the defendant being at the time present in person, with his attorney, and being allowed an opportunity to cross-examine the witness, there is nothing of which he can complain.

FROM the Circuit Court of Shelby.

Tried before the Hon. S. H. SPROTT.

The defendant in this case was indicted for grand larceny, and the indictment also contained a count for receiving stolen goods. On the trial, he reserved exceptions to the refusal of several charges asked, and also to the action of the court in recalling the jury, after they had retired to consider of their verdict, and allowing the solicitor to re-examine a witness as to the value of the stolen goods; and these rulings are here urged as error.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—After the jury had been charged, and had retired, the court recalled them, and permitted the State to introduce evidence as to the value of the goods alleged to have been stolen. The defendant objected to the jury being recalled, and additional evidence introduced, on the specified ground,



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that written charges, which had been requested by the defendant, and refused, were based on the fact, that there was no evidence of the value. The record shows that evidence of the value of the stolen property was introduced during the progress of the trial, substantially the same as after the jury were recalled. So, this ground of objection is unsupported by the record, and the re-introduction of the same evidence worked no injury to the defendant in this respect. While it is true, that the judge should have no private communication, either verbally or in writing, with the jury, after they have retired, recalling them into open court, for the purpose of explaining instructions already given, or of giving further instructions, or of admitting evidence of some fact overlooked during the trial, rests in the sound discretion of the court. Of course, if the jury are recalled for either of these purposes, the accused should be present, and also his counsel, if reasonably practicable.—*Col-lins v. State*, 33 Ala. 434; *Hobbs v. State*, 75 Ala. 1; Bish. Crim. Pro., § 1000. The defendant and his counsel were both present, and were allowed the privilege to cross-examine the re-introduced witness, and to introduce other witnesses, if they desired. All the rights of the defendant were observed and guarded by the court.

The charges requested by the defendant were properly refused, on the evidence then before the jury, which tended to show the guilt of the defendant, and the credibility and sufficiency of which were submitted to them.

Affirmed.

## Hurst & Hill v. The State.

### *Indictment for Assisting Prisoner to escape from Jail.*

1. *Assisting prisoner to escape from jail; constituents of offense.*—To authorize a conviction for aiding a prisoner to escape from jail (Code, § 4130), it is not necessary that the escape be effected or attempted by the prisoner; nor is it necessary that there shall be the specific intent to liberate any particular prisoner, though a general intent to liberate must exist, and must be found by the jury; nor can the offense be consummated against the known consent of the prisoner.

2. *Same; sufficiency of indictment.*—In an indictment under this statute (Code, § 4130), a count which avers that the defendants “did assist one G., who was lawfully confined in the county jail of said county, under a charge of murder, to escape from said jail,” or, “did, with the intent to facilitate the escape of said G. from said jail, break or blow a hole in the wall of said jail, by placing dynamite in said wall, and by igniting said dynamite;” or, “did break the wall of said county jail, to

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assist said G. to escape from said jail;" or, "did, with and by the use of dynamite, break a rock which composed a part of the wall of said county jail, to assist said G. to escape from said jail,"—is each fatally defective in describing the offense.

FROM the Circuit Court of Calhoun.

Tried before the Hon. JAMES AIKEN.

The indictment in this case contained six counts. The first count charged, that the defendants, John Hurst and Thomas A. Hill, "did assist one Gid J. Entriker, who was lawfully confined in the county jail of Calhoun county, under a charge of murder, to escape from said jail." The fourth count charged, that said defendants, "with intent to facilitate the escape, from the jail of Calhoun county, of one Gid J. Entriker, who was lawfully confined," &c., "did break or blow a hole in the wall of said jail, by placing dynamite in said wall, and by igniting said dynamite." The fifth count charged, that said defendants "did break the wall of the county jail of said county, to assist one Gid J. Entriker, who was lawfully confined," &c., "to escape from said jail;" and the sixth count, that said defendants, "with and by the use of dynamite, did break a rock, which composed a part of the wall of the county jail of Calhoun county, to assist one Gid J. Entriker, who was lawfully confined," &c., "to escape from said jail." Being tried on issue joined on the plea of not guilty, the jury found the defendants guilty as charged in the first, fourth, fifth and sixth counts; and they afterwards moved in arrest of judgment, on account of alleged defects in each of those counts; but the motion was overruled.

On the trial, as appears from the bill of exceptions, it was shown that, on or about October 20th, 1885, said Entriker being then confined in the county jail under a charge of murder, and the defendants being confined in the same room with him, they obtained a quantity of dynamite, or other explosive substance, which they placed in a hole or crevice of the rock wall, and blew out an opening, through which they went from one room into another; that said Entriker did not escape, nor attempt to escape, but, as the evidence for the defendants tended to show, declared to them his intention to remain and stand his trial. The defendants requested the following charge, with others: "10. If the jury believe, from the evidence, that Entriker was unwilling to avail himself of the means of escape which the blowing up of the jail by the defendants might open up to him, and so told the defendants, or told them this in substance, then they must find the defendants not guilty as to all the counts in the indictment." The court refused this charge, and the defendants excepted.

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BROTHERS & WILLETT, for the appellants, cited *Ramsey v. The State*, 43 Ala. 404; *Kyle v. The State*, 10 Ala. 236; *Wilson v. The State*, 61 Ala. 151; *Grattan v. State*, 71 Ala. 344; 1 Brick. Dig. 469, §§ 287-8.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—The indictment in this case was framed under section 4130 of the Code of 1876, which reads as follows: "Any person who conveys into the county jail, or into any other lawful place of confinement, any disguise, instrument, arms, or other thing useful to aid any prisoner to escape, with the intent to facilitate the escape of any prisoner therein lawfully confined under a charge or conviction of felony, or who, by any other act, or in any other way, assists such prisoner to escape, whether such escape be attempted or effected or not, must, on conviction, be imprisoned in the penitentiary, or sentenced to hard labor for the county, for not less than two, nor more than ten years."

There is either a misplacing of the qualifying clauses of this statute, or such confusion in its expression, as that we find difficulty in its interpretation. We can readily understand how the conveying into a prison of a "disguise, instrument, arms, or other thing useful to aid a prisoner to escape," when done "with the intent to facilitate the escape," may constitute a crime, "whether such escape be attempted or effected or not." There is the evil intent to commit the crime, coupled with the evil act done, which is well adapted to facilitate the escape. The second clause, however, is somewhat confusing. Its language is, "or who, by any other act, or in any other way, assists such prisoner to escape, whether such escape be attempted or effected or not." The clause, "assists such prisoner to escape," in its ordinary import, means that the prisoner does effect his escape, and that he has assistance in accomplishing it. That the prisoner neither effects nor attempts escape, may well harmonize and consist with any or all of the forbidden acts named in the first clause—"disguise, instrument," &c., conveyed into the prison. It may be incongruous with the latter clause—"assists such prisoner to escape." Possibly, the language, "any other act, or any other way," may be broad enough and flexible enough to include offered assistance to escape, even when done by some other act, or in some other way, than those specially named. If so, the added clause, "whether such escape be attempted or effected or not," would not be incongruous. The present cause does not require us to determine this last question. We do not hesitate to declare, however, that the clause which makes the offense complete,



[Hurst &amp; Hill v. The State.]

whether escape be attempted or effected, has unmistakable reference to the acts enumerated and forbidden in the first clause.

Is it necessary to a conviction that there shall be independent proof that the accused had the specific intent to aid the particular prisoner, or any particular prisoner to escape? Can the offense be committed without the consent of the prisoner?

The first of these questions we answer in the negative. All men are presumed to intend the natural consequences of their acts. All men are presumed to be averse to involuntary confinement, and to desire liberty. So, if a prison be opened, or so broken as to allow the inmates to escape, this would be proof of a general intent, and would authorize the jury to find a specific intent to liberate each and every prisoner confined therein. And on the same principle, we answer the second of the above questions in the negative.

The intent to liberate, however, must exist, and must be found by the jury. We have shown above that a general intent is enough, and have also stated that the jury may infer such intent from any intentional breaking, or assistance in an attempt to so break the prison, as that the prisoners confined therein can escape. Suppose there are prisoners, one or more, confined in the prison, who will not escape, even if the opportunity is offered, who have no intention to escape, and the alleged jail-breakers have knowledge that such prisoners do not intend to escape. This, if satisfactorily proven and found by the jury, disproves both special and general intent to aid or facilitate the escape of such prisoner or prisoners.

In framing an indictment under this statute, is it sufficient, in any case, to simply pursue the language of the statute? Several of the alternate words or phrases, standing alone, would be manifestly insufficient. The words "disguise," and "instrument," are of this class. If either be employed, it would be necessary to add the averment, that the disguise or instrument was "useful" to aid the escape. And the word "instrument" is comprehensively generic. A tool used for any work or purpose, is its meaning in this statute.—Worcester's Dictionary. The name, or other description of the instrument, should also be set forth, to make the indictment sufficient, if that was the means of alleged "aid" relied on. So, of the generic terms or phrases, "other things," or "any other act," or "any other way." It would be necessary to aver what that other thing, act, or way was, and that it was useful to aid the prisoner's escape, unless by its very nature it appeared to be so. Even the word "arms" is indefinite. It would be safest, in all cases, to add the qualifying words, "useful" to aid the pris-

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oner in making his escape. And especially in all indictments framed under the first clause. The averment that it was done "with intent to facilitate the escape," is indispensable. Without such intent, the crime is not committed.—Clark's Cr. Dig. § 86; *Norris v. The State*, 50 Ala. 126; *Henderson v. The State*, 70 Ala. 23; *Kelly v. The State*, 72 Ala. 244; *Rowland v. The State*, 55 Ala. 210; *Stone v. The State*, 63 Ala. 115.

The defendants were found guilty under the first, fourth, fifth, and sixth counts in the indictment. Under the rules declared above, each of those counts is insufficient. The first omits all mention of means, or instrumentalities, by which assistance was given or attempted. The fourth, fifth, and sixth counts, each, fails to aver that the act charged was useful to aid the prisoner to escape, and there is nothing in the nature of either of the alleged acts, stated as they are, which can supply that omission. The indictment is insufficient, and the judgment should have been arrested. The tenth charge asked should have been given.

Reversed and remanded.

## Rogers v. The State.

*Scire Facias against Bail, on Forfeited Recognizance.*

1. *Discharge of bail, by discontinuance of prosecution.*—Where a person is bound over to appear at the next term of the Circuit Court, and from term to term thereafter until discharged by law (Code, § 4852), to answer for an offense with which he is charged on preliminary examination before a magistrate; if no indictment is found against him at that term of the court, no forfeiture taken, and the case not continued for further investigation, the prosecution is discontinued, and the sureties on the recognizance are discharged.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. JAMES E. COBB.

The record shows that Henry Holifield, on preliminary investigation before a justice of the peace, under a charge of burglary, "was ordered to be held to answer said offense, and the sheriff was ordered to take and approve bond, in the sum of \$200, in all respects as provided and required by law;" and that a bond was thereupon taken from him by the sheriff, with Lewis Holifield and J. M. Rogers as sureties, which was dated and approved on the 23d December, 1884, and by which they promised to pay the State of Alabama \$200, "unless the said

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Henry Holifield appear at the next term of the Circuit Court of said county, and from day to day thereof, and from term to term thereafter, until discharged by law, to answer a criminal prosecution for the offense of burglary." At the ensuing Spring term, 1885, of the Circuit Court, no indictment was found against the defendant, and "no order or action of the court was taken or asked, either to continue the charge, or to discharge the obligors from said bond." At the next December term, 1885, an indictment for the alleged offense was found against said Holifield; and he having failed to appear, a conditional judgment was entered against him and his sureties. At the same term, Rogers, one of the sureties, appeared, waived the issue or service of a *seire facias*, and pleaded the facts above set forth, claiming that the sureties were discharged by the failure to find an indictment at the first term of the court, or to make any order continuing the case. The facts being admitted as stated, the court held that the sureties were not discharged, because no order discharging them was made or asked; and therefore made the judgment final against them, but only for twenty-five dollars. The conditional judgment, and the final judgment, are now assigned as error.

THOS. H. WATTS, L. E. PARSONS, JR., and J. H. PARKER, for appellant, cited *Goodwin v. State*, 1 Stew. & P. 465.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The facts averred in the pleas constitute a good defense to the action. These facts being established, there was no such failure to appear on the part of Holifield as to forfeit the undertaking of the sureties on his bail-bond, in the manner and at the time such forfeiture was taken. The practice on this subject was settled in the case of *Goodwin v. The Governor*, 1 Stew. & Port. 465, which was decided as early as the year 1832, and has never been since overruled. It was there held, that when a party was recognized to appear at a particular term of the Circuit Court, to answer for an offense with which he was charged, and the grand jury failed to find an indictment against him, and the cause was not continued for further investigation, this operated as a discontinuance, and discharged the accused, in the absence, at least, of any forfeiture being taken for sufficient reasons at such term of the court.

There are cases, in other States, which hold that the accused is not discharged, until the court enters of record an order of exoneration to this effect. But we see no harm to ensue from adhering to the rule settled in *Goodwin's Case*, *supra*. If the



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accused is not called at the term of the court at which he was to appear by the express stipulation of his bond, and no indictment is found against him by reason of the grand jury's ignoring the bill, and the Circuit Court makes no order authorizing a continuance of the investigation at the ensuing term, the sureties have a right to believe that they are discharged from the obligation of their undertaking. If one term of the court can be passed without action by the grand jury, or the court, why not another? And if more than one, when are the sureties to know that the legal custody of the accused, with the power to arrest and deliver him into the hands of the sheriff, has ceased, or been abrogated?

The safer practice, perhaps, to prevent misunderstanding, is for the court to have the accused discharged by proclamation, and by entering of record an *exoneretur*; though this course is not deemed necessary, nor is it believed to be customary in this State. But, where it is desired to authorize a continuance of the investigation by the grand jurors, the court, in order to hold the sureties, should make an order to this effect, showing a refusal to discharge the principal.—1 Bish. Cr. Proc. (3rd Ed.) § 870 *a*, § 264 *f*; *Rex v. Palmer*, 6 Car. & P. 652; *Knott v. Sargent*, 125 Mass. 95.

The discontinuance of this cause operated as a legal discharge of the accused. The Circuit Court erred in not so ruling.

The judgment is reversed, and the cause remanded.

## Brown v. The State.

### *Indictment for Arson.*

1. *Impeaching witness by proof as to former statements.*—When a witness testifies, on the trial, to material facts which he did not state when examined as a witness on the preliminary examination of the defendant, he may be impeached, a proper predicate being laid, by proof of such omission; and the principle is the same, when he neither denies nor admits the omission, simply saying that he does not recollect.

FROM the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

The indictment in this case charged that the defendant did willfully set fire to or burn a house or building, the property of Fred Sloss, Macklin Sloss and A. W. Smith, "which was at the time used for storing tools, oils and mining implements, and shel-

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tering the scales for weighing coal;" or, as described in the second count, "which was constructed and used as a coal-chute." On the trial, as the bill of exceptions shows, the State having proved the burning of the coal-chute on a night in the month of August, 1885, and the ownership of the property as alleged in the indictment, introduced one Reuben Davis as a witness, who was a negro, and "who testified, among other things, that the defendant was out at the chute while it was burning, and that he (witness), seeing a car in danger of being burned, asked defendant to help him roll it out of the way; to which defendant replied, that he did not care if all the property of the d—d white men did burn up. Said witness testified, also, that defendant told him, during the week next after the burning, that he did not intend to tell who burned the said chute. Said witness testified, also, on cross-examination, that he had been examined as a witness on the preliminary examination of the defendant in this case, and had then told all he knew about the case, and all he had heard the defendant say about it; that he could not say positively whether he then testified to said remark made to him by defendant the week after the burning, but his best recollection was that he had so testified." The defendant then introduced one W. A. Brown as a witness, who was a deputy-sheriff, and who had heard the testimony of said Reuben Davis on said preliminary examination; and proposed to prove by him that said Davis did not then testify that defendant had made any such remark to him. On objection by the State to this testimony, when offered in several different forms, the court excluded it; and the defendant excepted. This is the only ruling to which an exception was reserved.

No counsel appeared for the defendant in this court, so far as the record and the dockets show.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—A witness may be impeached, not only by proving that, at other times, he has made statements contradictory of, or inconsistent with those he makes on the trial, but also by proving that, on a former occasion, and under circumstances when it was his duty to state the whole truth, he omitted in his statement facts to which he testifies on the trial. The admissibility of the impeaching evidence depends on the question, whether the former statement was made under such circumstances that the duty to tell the whole truth arose. An omission, when such duty arises, may originate a presumption that the omitted facts did not transpire, and may tend to contradict the testimony of the witness. Whether such

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omission discredits the witness, and to what extent, depends upon the attendant circumstances, and such explanation as the witness may be able to give.—1 Whar. on Ev. § 554; *Briggs v. Taylor*, 35 Vt. 57; *Perry v. Breed*, 117 Mass. 155.

Neither is it necessary for the witness to positively deny the omission. If he says he does not recollect, it is competent to prove his failure to state, on the former occasion, the facts to which he testifies on the trial. When the witness neither admits nor denies the omission, it is competent for the opposing party to prove the affirmative. He will not be permitted, under the pretense of not remembering, to escape contradiction and impeachment.—*Payne v. State*, 60 Ala. 80; *Ray v. Bell*, 24 Ill. 444; *Gregg Town. v. Jamison*, 55 Penn. St. 464. The fact omitted must be material, and relevant to the matter in issue.

It was the duty of the witness Reuben Davis, who was a witness on the preliminary trial, to have then stated the whole truth; and it was permissible for the defendant to prove, by a witness who was present, that he omitted to state on the preliminary examination the declaration of the defendant, to which he testified on the trial, as having been made during the week next succeeding the burning. The time, place and person were sufficiently called to the attention of the witness to prevent surprise, and to afford an opportunity of explanation, if from forgetfulness, or because his attention was not directed to it, or from ignorance of its materiality, or other excusable cause, he omitted to state the declaration on the preliminary trial.

Reversed and remanded.

## **Bolman v. Lohman.**

### *Bill in Equity for Foreclosure of Mortgage.*

1. *Devise of estate for life, without liability to account, and with general power of disposition.*—A devise and bequest of an express estate for life, with general power of disposition, and without liability to account, followed by a devise over of what may remain unused and undisposed of, vests in the first taker an absolute estate in fee simple.

2. *Construction of instrument partly written and partly printed.*—In the construction of an instrument partly written and partly printed, greater weight is to be attached to the written than the printed portions; but the instrument must be examined in its entirety, apparent discrepancies reconciled, if possible, and some operation given to each clause.

3. *Mortgage construed, as to default and forfeiture.*—A mortgage which



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purports to be given as security for money loaned, made payable "on demand" by a printed clause, and on the further condition, expressed in writing, that the interest shall be paid semi-annually, and, on failure to pay the same, that the mortgage may be foreclosed for both principal and interest; and by which it is further provided, that the money loaned shall, on the death of the mortgagee, belong to the mortgagor if living, or to her surviving children in the event of her death before that time, and that the mortgage shall then be null and void,—does not contemplate or authorize foreclosure as to the principal, so long as the interest is paid as stipulated; and when diligent effort to pay promptly is shown, whether intentionally prevented by the act of the mortgagee, or defeated by unavoidable causes, a default and consequent forfeiture can not be claimed.

4. *Rights of tenant for life and remainder-men, on foreclosure of mortgage securing fund.*—On the foreclosure of a mortgage given to secure the payment of money loaned, when the mortgagee is only entitled to the interest during life, with remainder over on her death, the money should be paid into court, and so secured as to protect the rights of the remainder-men, while providing for the payment of the interest to the mortgagee.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 24th of July, 1883, by Mrs. Augusta Lohman, as the complainant described herself, though she was then the wife of Peter Kraft, against Mrs. Louisa Bolman; and sought the foreclosure of a mortgage on a certain lot in Mobile. The mortgage, a copy of which was made an exhibit to the bill, was dated December 1st, 1881, and was duly acknowledged before a notary public on the day of its date. Its material parts are copied in the opinion of the court. The property conveyed by it was held by Mrs. Bolman under the will of her deceased husband, John Bolman, which was duly proved and admitted to probate on the 13th of December, 1881, he having died three or four weeks before that time. The material provisions of said will are also copied in the opinion of the court. An amendment of the bill was allowed, which alleged that the \$2,000 borrowed money, described in the mortgage, was used in paying off a former mortgage on the property in favor of Mrs. Frank, which had been given by Mrs. Bolman and her husband; and the complainant prayed, under appropriate allegations, to be subrogated to the rights conferred by this mortgage, if her own mortgage did not convey the entire interest in the property. This feature of the case was discussed on the former appeal (74 Ala. 507), but is immaterial as the case is now presented. By another amendment of the bill, Peter Kraft was joined as a complainant with his wife, and, by a subsequent amendment, he was made a defendant; but no question is now presented growing out of his rights or interest. An answer to the bill was filed by Mrs. Bolman, in which she stated the circumstances attend-

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ing the transaction in which the mortgage originated ; alleging that a greater part of the money said to have been loaned to her by the complainant was at the time on deposit in the banking house of T. P. Miller & Co. in their joint names, the interest only being payable to the complainant during her life ; that this deposit was withdrawn, and, a small sum being added to it, made up the sum of \$2,000, on which she was to pay interest at six per cent. to the complainant during her life, while the principal sum was to belong to respondent, if she survived the complainant, or to her children if complainant survived her ; and she prayed that her answer might be taken as a cross-bill, and that the mortgage might be reformed so as to show the true contract and agreement between the parties. Other matters were also set up in the answer, which are not material as the case is here presented.

On final hearing, on pleadings and proof, the chancellor refused a reformation of the mortgage, overruled all the defenses set up, and rendered a decree foreclosing the mortgage as prayed. Mrs. Bolman appeals from this decree, and assigns each part of it as error.

F. G. BROMBERG, for the appellant, argued each of the assignments of error, and insisted—1st, that the evidence authorized a reformation of the mortgage ; 2d, that the mortgage, on its face, did not authorize a foreclosure as to the principal of \$2,000, so long as the interest was paid ; 3d, that there was no default as to the interest, because payment was intentionally prevented by the complainant herself. He cited 1 Story's Equity, §§ 115, 140, 142, 152, 155, 159-60, 164, 251, 307, 308 ; *Berry v. Sowell*, 72 Ala. 17 ; *Larkins v. Biddle*, 21 Ala. 252 ; 13 Gray. 187, 373 ; Pom. Eq., § 852 ; 62 Wisc. 316 ; 1 Binn. 616 ; 6 S. & R. 172 ; 2 Johns. Ch. 585 ; *Dawson v. Burrus*, 73 Ala. 111 ; 2 Sch. & Lef. 474 ; *Goosey v. Goosey*, 48 Miss. 210 ; *Foster v. Rockwell*, 104 Mass. 167 ; 2 Whart. Ev., § 1249 ; 1 *Ib.* § 254 ; 2 Jones Mort. § 7471 ; *Noyes v. Clark*, 7 Paige, 119.

OVERALL & BESTOR, and L. H. FAITH, *contra*, relied on the chancellor's decree and the former decision of this court. *Bolman v. Lohman*, 74 Ala. 507.

STONE, C. J.—We have carefully examined the testimony, and are not convinced the chancellor erred in holding it insufficient to reform the mortgage, or to make it speak other than what its language imports. Mr. Overall, the draughtsman, is very positive and explicit in his testimony, and says he wrote the mortgage as he was requested to write it. This testimony,

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aided by the writing itself, is not overcome by the opposing testimony. We would, if the inquiry was before us as an original one, find on this issue as the chancellor did. The case must, then, be decided on the title-papers themselves.

What interest did Mrs. Bolman's mortgage convey? This must depend on the proper interpretation of her husband's will, the source of her title. That will, in its first clause, gives to testator's wife all his property, real and personal, with its income and profits, "for her use and disposal during her natural life." The second clause gives over to testator's children, to take effect at the death of his wife, "all of the foregoing property, rents, income and profits, remaining undisposed of and unused by my said wife." The third clause, after appointing his wife executrix, and relieving her from giving bond, and from liability "to account in any court for the performance of her duties," clothed her with "full power to sell and dispose of all my property, real and personal, of every kind, at her discretion, without the orders of any court, and with full power to invest the proceeds thereof in any manner she deems best, or to employ the same in any business she may see proper to do." This will was duly probated.

We have here a will, giving an express estate for life, without liability to account, with devise over of what may remain undisposed of, or unused, and with express general power of disposition in the first taker; full authority to enjoy, use and dispose of the entire property, with a gift over of only what may remain undisposed of and unused. Under all the authorities, as well as in the nature of things, Mrs. Bolman took an absolute estate in the property, and could dispose of it as she pleased.—*Weathers v. Patterson*, 30 Ala. 404; *Flinn v. Davis*, 18 Ala. 132; *Barford v. Street*, 16 Vesey, 135; *Irwin v. Farrer*, 19 Vesey, 86; *Daniel v. Dudley*, 1 Phil. Eng. Ch. 1; *Holloway v. Clarkson*, 2 Hare, 621; *Page v. Soper*, 21 Eng. L. & Eq. 499; *Idé v. Idé*, 5 Mass. 500; *Morris v. Phaler*, 1 Watts, 389; *King v. King*, 12 Ohio, 390, 474.

What we have said renders it unnecessary we should consider the question of subrogation. The mortgage of Mrs. Bolman gives all the security the ownership of the absolute title to the property can confer.

The original mortgage has been sent up for our inspection. In its preparation a printed blank was used, and the clause which determines the questions raised by the record is partly printed, and partly in manuscript. We submit a copy of the clause we propose to consider, distinguishing the printed parts by small Roman capitals. It is the *habendum* clause, and is in the following language: "TO HAVE AND TO HOLD THE ABOVE MENTIONED AND DESCRIBED PREMISES, WITH THE APPURTENANCES,



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UNTO THE SAID Augusta Lohman, of Mobile, Alabama, AND TO her HEIRS AND ASSIGNS, AND TO THEIR SOLE AND ONLY PROPER USE, BENEFIT AND BEHOOF FOREVER: PROVIDED, ALWAYS, AND THESE PRESENTS ARE UPON THE EXPRESS CONDITION, THAT IF THE SAID Louisa Bolman SHALL WELL AND TRULY PAY TO THE SAID Augusta Lohman the SUM OF Two thousand dollars on demand; and on the further condition, that the said Louisa Bolman shall pay each six months sixty dollars, as the interest on said sum, commencing on the 1st June, 1882. If she or her legal representatives fail to pay the same, then the said Augusta Lohman is authorized to foreclose the mortgage to collect the whole sum, principal and interest. If the said Louisa shall survive the said Augusta, then the said sum is to belong to her; and at the death of said Augusta, if she survive said Louisa, said sum shall then belong, share and share alike, to Carrie and Emma Bolman, children of said Louisa. And this mortgage shall then be null and void. This mortgage is given for 2000\$ cash, this day loaned me by said Augusta Lohman."

Among the rules for interpreting instruments partly printed and partly written, it is said that which is written shall have the greater weight, because it is presumed greater attention was bestowed on the written parts. The printed form is intended for general use, without reference to particular objects and aims. That which is written is supposed to be dictated by the particular intention and purpose of the parties contracting. It is also our duty, in arriving at a proper interpretation, to examine the whole instrument, with a view of ascertaining and carrying into effect the purpose and object the parties had in view; and we must strive to give some operation to each clause of the conveyance, and to reconcile apparent discrepancies. That parties intended to insert in their contract provisions that are incompatible, is not to be supposed; and a construction that would lead to such results, is to be avoided, if possible. *Ut res magis valeat quam pereat*, is alike a maxim, and the policy of the law.—1 Brick. Dig. 533; *Bulmar v. Jay*, 4 Sim. 48.

Looking at Mrs. Bolman's mortgage to Mrs. Lohman, and considering all its parts, we do not think the intention was to make the principal demandable, so long as there was payment of the semi-annual installments of interest. True, there is a clause providing for the payment of "two thousand dollars on demand." That clause, however, is partly printed, and, in view of other provisions, we think its insertion was a simple filling up of the blank. Immediately following it, and in connection with it, is a stipulation that Mrs. Bolman should pay, every six months, sixty dollars as the interest on said sum, commencing at the end of six months from the date of the

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mortgage; and fixing, at that place, no time when these semi-annual payments should cease. The next clause, however, is much more specific, and shows unmistakably when the principal sum would, or might become demandable. It provides that, if the interest installments were not paid, then Mrs. Lohman could foreclose the mortgage, and collect both principal and interest. Why insert this provision, if the principal was demandable at pleasure, without any reference to the payment or non-payment of interest? The first clause, giving authority to demand the money, must be interpreted in connection with this latter clause, which declares the conditions which will authorize a demand of the principal to be made—namely, on the failure to pay the agreed interest.

There is yet another reason, however, why we feel assured our interpretation of Mrs. Bolman's mortgage is correct. It provides that, at the death of Mrs. Lohman, the principal sum, two thousand dollars, is to become the property of Mrs. Bolman, if living; and if dead, then of her daughters. This stipulation is as binding and irrevocable as any other provision of the contract. Its effect was and is to divest all title to the principal of the two thousand dollars out of Mrs. Lohman, except as a consideration for the mortgage security she took—a security for the semi-annual payment of the agreed interest to her during her life. And if, by non-payment of interest, the right accrued to her to foreclose the mortgage, this would give her no right to receive or handle the principal, or to cut off the remainder she herself had created. She could only have it brought into the Chancery Court, and there invested and secured by the order of the court, so as to secure to her its interest or income. It would, in such event, become as much the duty of the court to secure the money for the benefit of the remainderman, as to provide for the payment of the interest and income to Mrs. Lohman.—*Mason v. Pate*, 34 Ala. 379; *Dunham v. Milhous*, 70 Ala. 596.

In corroboration of our interpretation of the mortgage, if corroboration is necessary, it may not be out of place to say, the testimony conclusively proves that Mrs. Lohman herself understood the mortgage as we do, until the alienation took place between her and Mrs. Bolman.

The question, then, is narrowed down to the inquiry, is it shown that Mrs. Bolman made default in the payment of interest, so as to authorize Mrs. Lohman to claim a foreclosure of the mortgage? We do not think the testimony proves, or tends to prove she made a willful default. On the contrary, we think she made diligent effort to pay the interest punctually; and if not intentionally prevented by Mrs. Lohman, it is at least shown that the former made every effort to pay the money

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promptly. This is all that equity and good conscience can require.—*Bass v. Gilleland*, 5 Ala. 761.

Many other questions have been discussed, but what we have said renders their decision unnecessary.

The decree of the chancellor is reversed, and a decree here rendered, dismissing complainant's bill, at the cost of her next friend, in the court below, and in this court.

## Lott v. Mobile County.

*Bill in Equity by County, against Tax-Collector and Sureties on Official Bond, for Account, Discovery, and Enforcement of Lien.*

1. *Enforcement of statutory lien against property of tax-collector and sureties.*—A court of equity will entertain jurisdiction of a bill in the name of the county, against a defaulting tax-collector and the sureties on his official bond, to enforce the lien declared by statute against their property.

2. *Same; averments of bill.*—Such a bill being supported by an independent equity, it is not necessary that it should aver that the accounts are complicated, nor that it should contain the averments necessary in a bill for discovery, or in a bill to surcharge and falsify a stated account.

3. *When account becomes stated.*—A statement of his accounts by the tax-collector, prepared by him and submitted to the complainant, does not become a stated account, unless retained without objection within a reasonable time; and where it involves transactions extending through a period of nine years, and involving more than six hundred thousand dollars, its retention for thirty-five days before filing the bill is not unreasonable.

4. *Authority to collect escaped taxes.*—It is the duty of the tax-collector to collect delinquent taxes for previous years remaining uncollected, for which no credit has been given on the allowance made for errors and insolvencies.

5. *Non-joinder of sureties as parties.*—The tax-collector's bond being made joint and several by statute (Code, §§ 2905, 3754), it is not necessary that all of the sureties should be joined as defendants to the bill.

6. *Statutory lien created by official bond.*—The lien declared by statute to be created by an official bond (Code, § 403), operates on property acquired by the principal after its execution, and on property acquired by the sureties after his default and before suit brought.

7. *Multifariousness.*—The bill is not multifarious, because it joins as defendants some of the sureties on two bonds, given for successive terms, alleging that the tax-collector kept but one running account, in which collections were applied indiscriminately. (STONE, C. J., *dissenting*.)

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 5th October, 1885, in



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the name of Mobile county as complainant, against Elisha B. Lott, tax-collector of said county for many years, and William Turner, William Otis, Rufus Dane, Charles Farley, and Thomas Conboy, sureties on his several official bonds; there being, also, on each bond, several other sureties, who were not sued. The prayer of the bill was expressed in these words: "That said Lott may make a full and true discovery and disclosure of and concerning all taxes due your orator for years preceding 1880, which he has collected since the 7th day of August, 1880; that an account be taken under the direction of the court, between your orator and the defendants, to ascertain and fix the amount due it from said Lott, on account of such back taxes, and the county taxes levied and collected for each of the years 1880, '81, '82, and '84, and the date and amount of each default made by said Lott as to such back and other taxes; that the amount due by each of said defendants, other than said Lott, on account of such defaults, be ascertained and declared; that said defendants Dane and Otis be each required to disclose and fully discover what property, real and personal, other than that described in Exhibits B, and C, he owned at the time of the respective defaults for which he shall be decreed liable, and also what property he has acquired since such defaults, and what disposition he has made of the same, and what thereof he now owns; that defendants Turner, Farley and Conboy, each, make full and complete discovery of all real and personal property owned by him at the time of the respective defaults for which he shall be decreed liable, or which he has since acquired, and what disposition he has made of the same, and what thereof he now owns; that this hon. court will ascertain the amount for which your orator has a lien upon each piece of property of each of the defendants, and will decree such piece of property to be sold for the satisfaction of such amount, and the proceeds thereof to be so applied; and that your orator shall have such other and further, or such different relief, as the nature of the case may require."

The defendants demurred to the bill, and assigned, jointly and severally, the following grounds of demurrer: (1.) Because the complainant "has a full, complete, and adequate remedy at law." (2.) Because the bill "does not allege and set forth any fact showing that the account filed by said Lott is incorrect, or that any particular therein is incorrectly claimed by him as a credit." (3.) Because the bill shows that said Lott "has not concealed or withheld from complainant any books and vouchers, or any information, whereby complainant has been unable to ascertain and state an account with said Lott, without a resort to a bill of discovery; and fails to set forth any grounds for a discovery from him touching his said account." (4.) Be-

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cause he "fails to point out in any particular wherein said Lott's account with complainant has become and is complicated and entangled, so that the same can not be adjusted at law." (5.) "Because the claiming of credits by said Lott in his said account, for payments which he has not made, and for abatements and allowances which were never granted to him, or which were unlawfully attempted to be given him, are matters properly cognizable in a court of law, and are no grounds for a resort to equity." (6.) Because said Otis, Dane, Turner, Farley and Conboy are not, nor is either of them, "liable for any alleged default of said Lott growing out of his alleged failure to discharge his duty as tax-collector for years previous to the tax-year 1880, they not being his sureties as tax-collector for years prior to 1880." (7.) "Because the sureties of said Lott as tax-collector, for years previous to 1880, are necessary parties defendants to this bill, and should be made defendants." (8.) "Because F. A. Stoutz" and others named "are shown by the bill to be sureties of said Lott on said bond made August 17, 1880, and are each liable thereon, and are necessary and proper defendants to this suit, and should be made defendants." (9.) "Because the bill shows that C. Pritchard and Thos. LeBaron are also sureties on the additional bond given by said Lott on the 15th February, 1884, and are necessary and proper defendants to the bill, and should be made defendants." (10.) Because the bill shows that said Thos. Conboy "is surety for said Lott only on the bond made on the 23d day of August, 1884, upon a new term of office under an election held on the 4th August, 1884, and is not liable for any alleged default of said Lott for any previous term of office as such collector." (11.) Because the bill is multifarious in seeking to unite several distinct matters of account against different parties, sureties on different bonds, and for different terms of office. (12.) Because the bill does not show that the complainant "has any judgment against said Davis, Conboy, Farley, Otis and Turner, which remains unsatisfied, and upon which execution has been issued and returned unsatisfied; nor does it show that said defendants, or either of them, have or has conveyed any of their property retrospectively, with intent to hinder, delay, or defraud their creditors; nor does it charge any facts against them, whereby this hon. court can compel them to make any discovery." (13.) Because "Exhibit A to the bill shows that there is no debt due by said Lott to the complainant, and the bill fails to allege or set forth any facts going to show that said account is false and untrue."

The court overruled the demurrer, on all the grounds assigned; and its decree is now assigned as error by the defendants, jointly and severally.

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L. H. FAITH, for the appellants.—The appellants rely on each of the grounds of demurrer specifically assigned. As a bill for an account and discovery, or for a discovery in aid of an account, the allegations of the bill are wholly insufficient. *Chandler v. Hanna*, 73 Ala. 390; *Dickinson v. Garthwaite*, 34 Ala. 638; *Dallas Co. v. Timberlake*, 54 Ala. 403. As a bill to surcharge and falsify a stated account, it is equally defective.—*Cowan v. Jones*, 27 Ala. 325; *Travis v. Frierson*, 36 Ala. 720; *Langdon v. Roane*, 6 Ala. 518; *Phillips v. Belden*, 2 Edw. Ch. 1; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Baker v. Biddle*, 1 Baldw. C. C. 394. That the account rendered by Lott, and retained by complainant, without objection, until the filing of the bill, thereby became a stated account, see *Langdon v. Roane*, 6 Ala. 518; *Powell v. Powell*, 10 Ala. 900; *Murray v. Toland*, 3 John Ch. 569; *Phillips v. Belden*, 2 Edw. Ch. 1; *Brown v. VanDyke*, 4 Halst., N. J. 795. When the account of a party is offered as evidence against him, it is equally admissible as evidence in his favor, though mistakes apparent on its face should be corrected.—*Jones v. Jones*, 4 Hen. & M. 447; *Garrett v. Carr*, 3 Leigh, 407; *Waggoner v. Gray*, 2 Hen. & M. 603; *Freeland v. Coker*, 3 Munf. 352. As to the taxes for the years payable in 1880, or before, the law fixed an absolute liability on the collector and his sureties, when he failed to collect and make final settlement by the first of May each year; and this liability could not be transferred to the sureties for any subsequent year.—*The State v. Lott*, 69 Ala. 147; *Boring v. Williams*, 17 Ala. 523. Therefore, as to these transactions of former years, the sureties on the former bond or bonds were necessary parties; and if the bill is to be sustained as calling for a general accounting of all the collector's transactions during a period of ten years or more, all the sureties on the several bonds were necessary parties defendant. 1 Dan. Ch. Pr. 269; 1 Brick. Digest, 753, § 1687; *McKinley v. Irvine*, 13 Ala. 682; *Watts v. Gayle*, 20 Ala. 817; Story's Eq. Pl. §§ 72, 76a, 169, 218; *Cockburn v. Thompson*, 16 Vesey, 326; *Maddox v. Jackson*, 3 Atk. 406; *Bland v. Winter*, 1 Sim. & Stu. 246; *Griffin v. Spence*, 69 Ala. 398. But the bill is multifarious, in seeking to unite separate and distinct demands against different defendants in one suit. Although each bond imposes upon the sureties thereto a liability which is made joint and several by statute (Code, § 2905), the liability of each set of sureties is separate and distinct, and neither is liable for the defaults of the others, nor interested in the statement of the account against the others.—*Lehman v. Meyer*, 67 Ala. 404; *Clay v. Gurley*, 62 Ala. 14; *Boring v. Williams*, 17 Ala. 523. The complainant's lien does not extend to any property subsequently acquired by the sureties.—*Dallas Co. v.*



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*Timberlake, supra*; *Knighton v. Curry*, 62 Ala. 404; *Burns v. Campbell*, 71 Ala. 273; 58 Wisc. 56; 49 Mich. 425; 30 Minn. 132.

R. H. CLARKE, *contra*.—The main object of the bill is to enforce the lien declared by statute, against the property of the collector and his sureties; and the other allegations of the bill being merely incidental thereto, it was not necessary that they should conform to the rules regulating bills for a discovery in aid of an account, or to surcharge and falsify a stated account. As to the account furnished by the collector himself, which is made an exhibit to the bill, it is expressly averred to be full of inaccuracies, and its incorrectness is apparent on its face. This account extends through a period of ten years, and involves transactions amounting to more than half a million of dollars; and its retention for about thirty-five days, before filing the bill, does not raise it to the dignity of a stated account. As to the defaults, if any, committed prior to August, 1880, no account is asked, and no liability is sought to be enforced; but for moneys subsequently collected by Lott, though due for delinquent taxes of former years, and never accounted for, the collector and his sureties at the time of the collection are responsible.—*Perry Co. v. Railroad Co.*, 58 Ala. 564. The liability of the sureties on an official bond is made by statute joint and several, and the complainant may join one or more at his discretion.—Code, §§ 2905, 3754; *Teague v. Corbitt*, 57 Ala. 529. The complainant is not interested in the question of contribution among the several sureties, and was not required to bring them all in; but the accounts for the several years being complicated, and the collector being interested in all, there was no misjoinder nor multifariousness.—*Bank v. Walker*, 7 Ala. 927; *Halstead v. Shepard*, 23 Ala. 559; 65 Ala. 479; 67 Ala. 396; 75 Ala. 348.

SOMERVILLE, J.—The leading purpose of the bill is to enforce, in favor of the county of Mobile, a lien upon the property of certain sureties of the tax-collector of the county, created by the execution of three official bonds, extending through two terms of office, commencing in August, 1880. The first bond, which was executed in 1880, was reported insufficient by the grand jury, and the collector was required to execute an additional bond in February, 1884. The obligees of these two bonds became, under the statute, co-sureties as to each other.—Code, 1876, §§ 184–191. The last bond was executed by the collector, in August, 1884, upon entering upon his second term of office of four years. There are some sureties on each bond who were not on the other bonds, and some

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of the sureties on each instrument who are not joined in the suit.

The statute declares, that "the bond of the tax-collector shall operate, from its execution, as a lien in favor of the State and county on the property of such tax-collector, for the amount of any judgment which may be rendered against him in his official capacity for the State or county taxes, and on the property of his sureties, from the date of his default."—Code, 1876, § 403.

1. That the Chancery Court will assume jurisdiction to enforce a lien of this kind, is now well settled by our decisions; and this irrespective of any other equity, none other in fact being requisite.—*Shuessler v. Dudley*, at present term; *Knighon v. Curry*, 62 Ala. 404; *Dallas County v. Timberlake*, 54 Ala. 403.

2. The court having jurisdiction to enforce the lien, it necessarily follows that there is no force in the several grounds of demurrer to the bill, based on the idea that the complainant had a complete and adequate remedy at law, or that no facts were alleged showing a complicated state of accounts between the collector and the county, or that the bill was defective as one filed alone for discovery, or to surcharge and falsify a stated account, or other like objections. The bill is not dependent on either of these phases of equity to support it; for, when chancery assumes jurisdiction for one purpose, it will retain it for all, that complete and not partial justice may be done in the premises.

3. The appellant's contention, that the bill fails to aver an indebtedness to the complainant by Lott, with sufficient certainty, is not sustained by the record. It is true that the *ex-parte* statement of Lott's account, prepared by himself, which is set out *in extenso* as an exhibit to the bill, fails to show on its face that anything was due from him. But the correctness of this account is explicitly denied, and the bill avers that it was never accepted by the complainant as a correct account, but that it was full of gross errors, a correction of which would leave the defendant Lott and his sureties largely indebted to the complainant in the matter of his tax account. It is only stated accounts which need to be surcharged and falsified by the formal specification of particular errors. This account did not become stated by its retention without objection, upon any presumption of supposed acquiescence in its correctness, for the reason that objection was made to it in ample reasonable time. It was not presented by Lott until August 31, 1880, and the bill was filed October 5th following, or within thirty-five days from the date of its presentation. A much greater length of time might justly have been claimed for the proper examination of an account involving tax transactions running through

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nine consecutive years, and involving amounts footing up in the aggregate between six and seven hundred thousand dollars.

4. It was the duty of the tax-collector to collect delinquent taxes assessed for previous years, remaining uncollected, and for which no credit had been given under the statute authorizing credits for insolvencies and errors in assessments. *Perry County v. Railroad Company*, 58 Ala. 546; Acts Ala. 1880-81, pp. 6-7.

5. The complainant had a right, under the statute, to proceed against such of the sureties as it elected to do, the bonds being several as well as joint. It was no sufficient objection, therefore, that some of the sureties were not joined as defendants.—Code, 1876, §§ 3754, 2905; *Teague v. Corbitt*, 57 Ala. 529. The adjustment of the relative rights of contribution between the co-sureties was a matter affecting only themselves, and one in which the complainant had no material concern. The present bill does not seek any account for years prior to the year 1880. But taxes assessed previous to this time, and collected afterwards, are claimed to be a liability imposed upon those who were sureties during the time these collections were made respectively.

6. It is our opinion, that the lien of the tax-collector's bond, created by section 403 of the Code (1876), is intended to operate upon property of the collector acquired by him subsequently to the execution of the bond, as well as on such as he may own at the time of its execution. So with property acquired by the sureties at any time between the date of the collector's default and the time when suit is commenced for the enforcement of the statutory lien. Any other construction would operate to defeat the purpose of the statute, and to cripple its practical enforcement.

7. The bill is not, in our opinion, rendered multifarious, by joining in one suit the claims of the county against the sureties on the several bonds. The first and the second bonds are in effect but legally one, under the statute, the sureties on the additional bond being made co-sureties with those on the first. The principal in the third bond is the same as the principal in the other two, being the one debtor who is primarily liable, and for the settlement of whose accounts with the complainant the bill is filed. He is thus, in a certain sense, a ligament, or connecting link between all the bonds-men. The demands against the two sets of sureties, it is true, are, to some extent, distinct claims; but they are not entirely disconnected, in view of the particular facts of this case. The collector is averred to have kept one running account, extending all the way through his last two official terms, applying the funds collected miscellaneously, without regard



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to any proper appropriation of payments. The sureties on each bond are interested in the taking of the account, and in the proper adjustment of these payments, and in the correction of alleged errors in the account. The question of multifariousness is often one of policy and convenience, and, therefore, rests largely within the discretion of the court. It is sufficient to sustain a bill against such a charge, that each defendant has an interest in some one matter common to all the parties. The objection is discouraged, when sustaining it might lead to inconvenience, or defeat the ends of justice. Filing separate bills against each set of sureties in this case, it seems to us, might lead to great inconvenience, in view of the peculiar interest each surety has in the taking of the account, and the correction of the alleged errors of credits and payments.

We find no error in the decree of the court overruling the demurrers to the bill, and the decree is accordingly affirmed.

STONE, C. J.—Lott was tax-collector of Mobile county for two consecutive terms. His sureties on the two bonds, who are sued in this action, are not entirely the same. He is charged in one and the same bill with a default during each term, and he is sought to be held accountable for each of said defaults in one and the same bill. If the two defaults are shown, separate decrees will have to be rendered against the different sureties on the separate bonds. I think the demurrer for multifariousness ought to have been sustained.—Sto. Eq. Pl. §§ 271, *et seq.*; 1 Brick. Dig. 719.

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### *Bill in Equity for Foreclosure of Mortgage.*

1. *Usury as defense to bill for foreclosure.*—Usury in the transaction may be set up in defense of a bill to foreclose a mortgage, filed by an assignee, unless the mortgagor has estopped himself from setting up that defense against the assignee; and the defense being established, the complainant can recover no interest.

2. *Same; question of intent.*—Usury *vel non* is, ordinarily, a question of intent, to be determined by the stipulations of the contract, the attendant circumstances, and the acts of the parties, contemporaneous and subsequent; but, when the contract is usurious on its face, or when it appears that a greater rate of interest than the statute allows was knowingly taken, though taken through ignorance or mistake of law, the unlawful intent is presumed, and the form of the contract is immaterial.

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3. *What contracts are usurious.*—A mortgage given to secure the payment of \$648, as the amount due on a loan of \$600 for twelve months, would be usurious, if it appeared that the money was loaned in several installments during the year, while the whole sum bore interest from the first day; but, where the mortgage refers to and describes the several drafts or notes which evidence the payment of the several installments, and authorizes a foreclosure on default being made as to any one or more of them, not specifying any date as the maturity of the entire loan, the mortgage is not usurious on its face; and the fact that the entire annual interest was paid at one time, for two or more years, does not render the transaction usurious.

4. *Subsequent promise to pay illegal interest.*—When the original transaction is not usurious, a subsequent agreement to pay illegal interest, in consideration of forbearance for an indefinite time, the original contract remaining in full force without change, does not impart to it the taint of usury; and subsequent payments of illegal interest will be regarded as partial payments on the debt, with interest.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 9th October, 1883, by Henry Van Beil, against Beates Fordney and his wife; and sought to foreclose a mortgage on certain lands in Mobile, which the defendants had executed to one Nathan Van Beil, by whom it was assigned, for valuable consideration, to the complainant. The mortgage, which was made an exhibit to the bill, was dated May 7th, 1870, and conditioned as follows: "These presents are upon the express condition, that if the said Beates and Mary A. Fordney shall well and truly pay to the said Nathan Van Beil the sum of \$648, including interest, as is provided by six drafts drawn by said Nathan Van Beil, in favor of Beates Fordney, for \$100 each, dated May 3, 1870, for value received—one payable at sight, one at 15 days, one at 30 days, one at 45 days, one at 60 days, and the other at 75 days—upon N. Van Beil, 38 Broadway, N. Y.; which said drafts represent money loaned to said Beates Fordney by said N. Van Beil,—then these presents shall cease," &c. The mortgage contained a power of sale, "upon the happening of a default in the payment of the notes above described;" and authorized the mortgagee, in the event of a sale, "to apply the proceeds first to the payment of the amount due on the said notes at the time of sale, and after of the amount to become due, deducting legal interest and the costs of sale."

The defendants answered the bill, and set up usury in the transaction as a defense; alleging that, by the original transaction with Nathan Van Beil, Beates Fordney agreed and promised to pay \$48, annual interest on \$600, although he received the money, not at the date of the mortgage, but at intervals of fifteen days, as shown by the several drafts; that under this agreement, on or about the 1st May, 1871, he paid \$48 interest, and the like sum on or about the 1st May, 1872; that

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Van Beil then refused to continue the loan, except on the payment of twelve per cent. *per annum* interest, which respondents then agreed and promised to pay; and that under this new agreement, they had paid \$60 annual interest, on or before the 1st May each year, from 1873 to 1880, inclusive; and they insisted that the debt was fully paid.

On final hearing, on pleadings and proof, the chancellor held that the original contract was not usurious, and that the payment of \$48 as the annual interest, for each of the years 1871 and 1872, did not affect it, but left \$600 due as the amount of the debt when the new contract was made; that the agreement to pay twelve per cent. *per annum* was usurious, and the subsequent payments of \$72 and \$60 each were to be credited as partial payments on the debt without interest; and deducting an additional payment of \$100, made in May, 1873, he ascertained that the balance due complainant was \$8.00; for which sum, with interest, a decree of sale was rendered.

The complainant appeals from this decree, and here assigns it as error.

W. S. ANDERSON, for the appellant.—The original contract between the parties, as shown by the mortgage, and as established by the evidence, was without any taint of usury; and that is the contract the bill seeks to enforce by a foreclosure of the mortgage. If the subsequent agreement, set up in the answer of the defendants, be held usurious, they are to be regarded as the actors in asking relief against it, and must pay legal interest. If illegal interest was voluntarily paid, the defendants can not set it up as usury against a subsequent assignee. If the subsequent agreement was usurious, it can not affect the original contract, because it was void for indefiniteness; and subsequent payments will be regarded as partial payment on the debt.—*Munter & Faber v. Linn*, 61 Ala. 492; *Tyler on Usury*, 111, 458; 3 *Parsons' Contr.* 115; *Nichols v. Fearson*, 7 *Peters*, 104; *Jones on Mortgages*, §§ 647–8; 34 *N. J. Law*, 461; 1 *Suth. Dam.*, 577.

G. L. SMITH, *contra*.—The contract was usurious in its inception, as shown by the face of the mortgage and the testimony of the parties themselves; and the payments of the annual interest under it, for the years 1871 and 1872, show the construction and understanding of the parties.—*McWhorter v. Standifer*, 2 *Porter*, 519; *Williams v. Fowler*, 22 *How. Pr. (N. Y.)* 4–8; *Bazemore v. Wilder*, 10 *Ala.* 773; *Wright v. Elliott*, 1 *Stew.* 391. If there be any doubt as to the usury in the original contract, there can be none as to the subsequent agreement; and all payments made under it are to be deduct-



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ed from the principal debt.—Code, § 2092; *Ely v. McClung*, 4 Porter, 128. In other States, where usurious contracts are declared void, such subsequent promise would, of course, have no effect, and would leave the original contract in full force; but our statute only forbids the illegal interest, and requires payments to be applied in extinguishment of the principal debt.

CLOPTON, J.—The bill is brought by appellant, to enforce a claim by the foreclosure of a mortgage, executed by appellees to Nathan Van Beil, by whom the claim and mortgage were assigned, April 12th, 1883, to appellant. The appellees set up the defense of usury, both in the contract for the loan of the money, and in a subsequent contract, in 1873, for forbearance to collect the demand. The chancellor found that the original contract was not usurious, but that the subsequent agreement was, and decreed that the complainant was not entitled to any interest from the time of making the second agreement.

Usury in the transaction, out of which a mortgage arises, may be interposed as a defense to a bill for its foreclosure, although it may have been transferred and assigned to a third person, nothing having transpired to estop the mortgagor from making the defense; and when the mortgagee, or his assignee, resorts to a court of equity for relief, and the defense of usury is sustained, no interest will be allowed. Ordinarily, in construing the statutes against usury, the rule is, there must be an intention to contract for, and to take usurious interest—not necessarily an intention to *violate* the law; it suffices if there be an intention to take a higher rate of interest than the statute allows, though the parties may be ignorant of the statutory rate. When the usurious character of the contract does not appear from its expressed terms, but arises from stipulations ostensibly of compensation for risk, services, or other considerations, but really intended to yield to the creditor for the loan or forbearance a profit additional to the legal rate of interest, or is disguised under any cover, shift, or device, the form of the contract is immaterial, and the intent is the decisive test, to be ascertained from the attendant circumstances, and the acts of the parties, contemporaneous and subsequent. In such case, the uniform doctrine is, that in determining whether the contract is usurious, the principal and ultimate subject of inquiry is the intention of the contracting parties. If the contract is usurious upon its face, or if it appears from the transaction itself that a higher rate of interest than the statute allows is knowingly taken, and is not the consequence of a mistake of fact, the intention is presumed, and is not a

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material subject of further inquiry. When such is the necessary effect of the contract, it is usurious, though made from mistake or ignorance of the law. But, if an intention to take more than the legal rate is not shown by the facts of the transaction, nor presumed from the necessary consequence of the terms agreed on, the contract will not be pronounced usurious.—*Ely v. McClung*, 4 Por. 128; *Miller v. Bates*, 35 Ala. 560; *Uhlfelder v. Carter*, 64 Ala. 527.

It is true the first contract had its inception in an application for the loan of money. The following are the facts, as shown by the concurring testimony of the contracting parties. Nathan Van Beil, the mortgagee, who resided in New York, was in Mobile on a visit. While Van Beil was at the house of the mortgagor in Mobile, he was applied to for the loan of six hundred dollars, as the amount necessary to enable the mortgagor to complete a house he was then erecting, and proposed to secure the loan by a mortgage on the property. Van Beil consented to make the loan; but, not having the money with him, he drew on himself six several drafts for the sum of one hundred dollars each, payable to the order of the mortgagor, at such times as it was supposed the money would be needed for the intended purpose. The drafts were dated May 3, 1870, the first payable at sight, and the other five each successive fifteen days thereafter, the last being payable at seventy-five days. By an understanding between the parties, Chamberlain & Co., who were Van Beil's correspondents in Mobile, were to cash the drafts, and did cash each as they matured. The mortgage was prepared by Henry Chamberlain, and was executed May 7, 1870.

The transaction was not a "loan of credit." Both of the contracting parties testify that it was a loan of six hundred dollars, with interest at eight *per centum* for one year. It is insisted, notwithstanding the evidence of the parties, that the agreement to loan, when construed in connection with the mortgage as a part of the contract, is usurious upon its face. The argument is, that by the terms of the mortgage, the sum of six hundred and forty-eight dollars was made payable one year from its date; that interest can not be legally calculated from the time of the agreement to loan, but from the time the lender is deprived of, and the borrower acquires the use or benefit of the money—in this case, on each one hundred dollars, from the maturity of the drafts respectively; and that the necessary consequence is, the mortgagor pays, and the mortgagee receives, more than legal interest.

It is conceded that the drafts were equivalent to a loan of the amount for which each was drawn, at the time each was due; and all the mortgagee could legally take was interest at

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eight *per centum* from the time he was compelled or liable to pay the drafts. If the necessary consequence is, that the mortgagee obtains interest on the entire six hundred dollars from the date of the mortgage, we should be compelled, in the absence of proof showing that it was the result of a mistake in its preparation, to pronounce the contract usurious.— *Williams v. Fowler*, 22 How. Pr. Rep. 4. As it does not appear from the transaction, exclusive of the mortgage, that there was any intention to take usurious interest, and as there is no evidence tending to show that any device, unless it be the mortgage, was resorted to by the lender, to entrap the mortgagor, unconsciously, into paying more than legal interest, the inquiry will be confined to a construction of the mortgage, as illustrated by the transaction out of which it arose.

It must be conceded, that the mortgage is inartificially drawn. No definite time is expressed when a default may occur, or when the debt secured thereby is to be paid. The law-day is left to inference and construction. The mortgage provides, that upon the payment of "*the sum of six hundred and forty-eight dollars, including interest, as is provided by six drafts, drawn by said Nathan Van Beil, in favor of Bates Fordney, for one hundred dollars each, dated 3 May, 1870, for value received, one payable at sight, one at 15 days, one at 30 days, one at 45 days, one at 60 days, and the other at 75 days, upon N. Van Beil, 38 Broadway, N. Y., which said drafts represent money loaned to said Bates Fordney by said N. Van Beil.*" the mortgage shall be void; and further, "*upon the happening of a default in the payment of the notes above described, to sell our interest in the lands,*" etc. Other than as may be inferred from the above quoted portions, there is no day fixed for the payment of the money loaned; no express provision that it shall be payable one year from the date of the mortgage.

The statement of six hundred and forty-eight dollars, as the amount upon the payment of which the mortgage becomes void, indicates an intention that the whole sum shall be payable at the same time; but this construction is inconsistent with other express provisions. The drafts being drawn by Van Beil on himself, payable to the order of, and indorsed by Fordney, were not intended to constitute evidences of the indebtedness from the mortgagor to the mortgagee. The office of their specific description by date, amount, and the times when payable, is to show their representation of the money loaned, at each time, and the date when it commences to bear interest. Such is the signification of the words, "*including interest, as is provided by six drafts,*" immediately preceding their description. The reference to them, in the power



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of sale, as "*the notes above described*," serves the same office, in determining when a default in payment may occur. Both the parties testify that the loan was for one year, but neither states from any definite time; and the mortgagor testifies, that the forty-eight dollars, mentioned in the mortgage, was for one year's interest on the loan at eight *per centum*. The sum of six hundred and forty-eight dollars, as stated in the mortgage, must have been intended to cover the aggregate amount of the loan, and interest thereon for one year, not from the date of the drafts, or of the mortgage, but from the time the amount of each draft was received by the mortgagor, according to its tenor and effect. Hence, the qualification, that the aggregate amount named includes interest as is provided for by the drafts. The legal provision of the drafts, as to interest, is, that the sum for which each was drawn, bears interest from the time such draft became due. In the event of a sale under the power contained in the mortgage, it is provided that the proceeds shall be applied, "first to the payment of the amount due on the said notes *at the time of sale*, and after of *the amount to become due* deducting legal interest;" which authorizes a sale upon the failure to pay the sum due according to each draft, and is inconsistent with the construction that it was intended or understood that the aggregate amount of the drafts should become due at *one* time. By these provisions, the six hundred dollars loaned were, by the mortgage, payable in installments becoming due one year from the maturity of the representative draft.

The annual interest was not paid to the mortgagee, but to Chamberlain & Co., in Mobile. The payment of the entire interest for one year before the entire debt was due, when made, as it appears, voluntarily, is but slight, if any evidence of a previous usurious agreement, and will not vitiate a contract otherwise unattainted with usury. The first payment of interest was made several days before the day when the defendant claims the entire amount loaned was due, and so with each successive annual payment. We can not discover from the apparent inconsistent and confused provisions of the mortgage, or from the facts proved, an intention to take more than the legal rate of interest.

As the first contract is not tainted with usury, in what manner and to what extent is complainant's right of recovery affected by the subsequent usurious agreement? It may be stated as a uniform rule, that an obligation, free from usury in its origin, will not be tainted by a subsequent agreement to pay usurious interest, leaving the first contract in force, without renewal, discharge, or cancellation. As respects mortgages, it is said in 1 Jones on Mort. § 647: "When a

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mortgage is free from usury in its inception, no subsequent usurious contract in relation to it can affect the mortgage itself. It is only the subsequent contract that is affected by the usury." In those States where the statutes declare a usurious contract void *in toto*, the current of authorities is, that a debt, legal in its inception, will not be destroyed by a subsequent usurious agreement, although it may be thereby formally satisfied and discharged, and the security surrendered; but that on the subsequent security being annulled and avoided, the first is revived, and may be enforced, on the ground that a valid, subsisting contract is not affected by a subsequent invalid agreement.—*Real Estate Tr. Co. v. Kuch*, 69 N. Y. 248; *Swan v. Summers*, 2 Green (N. J.), 509; *Hammond v. Smith*, 17 Vt. 231; *Johnson v. Johnson*, 11 Mass. 359; *Patterson v. Birdsall*, 64 N. Y. 294; Tyler on Usury, 111; 3 Par. on Con. 115.

It is contended, that, inasmuch as under our statutes usurious contracts are not absolutely void, but voidable only to the extent of the interest, the rule is inapplicable. The cases in which it is said that such contracts are voidable only, must be construed in reference to the contracts in controversy—having both elements, principal and usurious interest; and not to a naked promise after maturity to pay mere usurious interest in the future on a previously legal and subsisting debt. An agreement by the principal debtor to pay usurious interest in the future, in consideration of the creditor's promise to extend the day of payment, will not discharge a surety; for the reason, that the promise of the creditor to give extension of time, not being founded on a sufficient legal consideration, is not valid, and consequently does not debar him from immediately enforcing the collection of the debt by pursuing his legal remedies against the principal debtor. The rule rests on the principle, that such agreement is void.—*Gilder v. Jeter*, 11 Ala. 256; *Cox v. Mo. & Gi. R. R. Co.*, 37 Ala. 320. In the case last cited, it is said: "A promise, on the part of the debtor, to pay usury in future, is an engagement which the law pronounces utterly void, and is, consequently, no consideration whatever for a promise by the creditor to give further time of payment. Such a contract for delay, not being binding on the creditor, does not discharge the surety."

The purpose of the bill is the enforcement of the first contract, which by law bore interest from its maturity. To avoid the payment of interest, the defendants allege that, after the maturity of the debt, the mortgagee agreed to forbear the collection of the principal in consideration of the mortgagor's promise to pay usurious interest. There was no settlement of the first contract, nor satisfaction, nor cancellation, nor renewal

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of the debt, which would have constituted a new contract. Had there been a new contract, and usurious interest included therein,—a contract voidable only as to the interest—the complainant, under the statutes would not have been entitled to recover any interest from the time it was made. But the first contract remained as originally made, without modification, the subsequent agreement being solely an indefinite extension of time of payment. This agreement, being supported by no other consideration than a promise to pay usurious interest in the future, is inoperative, and can not be enforced. Such agreement did not bind the mortgagee. To make it available, as a modification of the first contract, the defendants must establish it as a valid agreement; for a prior valid contract can not be settled, discharged, renewed, or modified, except by a subsequent agreement, founded on a sufficient legal consideration. The payments of usurious interest made thereafter are, in legal effect, payments on the debt, as if such subsequent agreement had not been made. When a rate of interest greater than the statute allows “is agreed to be paid after maturity, it is in the nature of a penalty, and has no effect; then the legal rate will govern, as though no agreement had been made.”—1 Suth. on Dam. 577; 1 Whar. on Con. § 466.

Reversed and remanded.

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### *Action for Damages by Servant, for Personal Injuries.*

1. *Sufficiency of complaint.*—The complaint in this case, which sought to recover damages for personal injuries sustained by plaintiff while engaged in feeding a circular saw in the defendant's employment, and which is set out in the statement of facts, “is equally as full, explicit and direct, as the complaint in the case of *M. & O. Railroad Co. v. Thomas*, 42 Ala. 672,” which was held sufficient on demurrer; and is not obnoxious to any of the grounds of demurrer specifically assigned.

2. *Charge to jury construed; explanatory charge.*—A charge to the jury in these words: “If the jury believe that the saw was out of order, and more dangerous than a sharp saw by reason of not being properly sharpened, and that the dullness of the saw caused the injury here complained of, and that this was unknown to the plaintiff, and that it could have been known to the defendant but for the want of reasonable care and diligence in keeping the saw in the proper condition, then their verdict ought to be for the plaintiff,”—does not invade the province of the jury, by assuming as fact matters dependent entirely on oral testimony; nor in failing to limit their conclusions or belief to the matters established by the evidence, as in the usual form: “If the jury believe from



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the evidence;" and if injury was apprehended from its form, an explanatory charge should have been asked.

3. *General charge in favor of defendant; when authorized, or proper.* A general charge in favor of the defendant should never be given, except when the plaintiff has failed to make out a *prima facie* case, or where, on the admitted facts, he is not entitled to recover; and where there is any conflict, however slight, in the testimony as to any fact material to the defense, such charge is properly refused.

#### APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by Lawrence Posey against Fred Hall, to recover damages for personal injuries sustained by plaintiff while feeding a circular saw in the defendant's employment; and was commenced on the 16th March, 1885. The complaint contained three counts, in substance as follows:

1. Plaintiff claims \$1,000 as damages, because, at the time of the injuries complained of, defendant was engaged in running an engine and circular saw for the purpose of sawing wood; and it was his duty to have said engine and saw, with other parts of the machinery connected therewith, in good repair and proper condition; and plaintiff was in the employment of said defendant, and was required by his employment to place the wood to be sawed on the table connected with said saw, to be sawed into proper lengths; that while in said employment, and in the service of said defendant, to-wit, on the 11th February, 1885, "plaintiff had several of the fingers of his right hand badly cut and mutilated," and was from said injuries sick and disabled, &c.; "and said wrongs were suffered because of the wrong and gross negligence of the defendant in running said saw, which was out of order, and unsafe, and unfit to be used in said business, and which, but for the want of proper care and diligence, would have been known to said defendant; and all of which was unknown to plaintiff."

2. [After alleging that the defendant was engaged in running an engine and circular saw, as before, and "that it was his duty to exercise due care and diligence in providing competent servants to run said engine and saw," and that plaintiff was employed in the business, and was required to place the wood on the table to be sawed.] "That heretofore, to-wit, on the 11th February, 1885, while in such employment and service, plaintiff had several of the fingers of his right hand badly cut and mutilated," and was thereby rendered sick and disabled, &c.; "and that said injuries and wrongs were suffered because of the want of due care and diligence on the part of said defendant in not providing and having competent servants to run said engine and saw for the purposes aforesaid; and which, but for the want of due care and diligence on the part

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of the defendant, would have been known to him, and all of which was unknown to the plaintiff."

3. [After alleging, as before, plaintiff's employment by defendant, and "that it was the duty of said defendant to have said engine and saw, and other parts of the machinery therewith connected, in good repair and proper condition, and to have the said engine and saw run with care."] That while in such employment, on the day aforesaid, "plaintiff had several of the fingers of his right hand badly cut and mutilated," whereby he was disabled, &c.; "and said injuries and wrongs were suffered because of the want of due care in providing fit and competent servants to run said saw and steam-engine, and which, but for the want of due care and diligence, would have been known to the defendant, and all of which was unknown to plaintiff."

The defendant demurred to each count of the complaint, and assigned the following as grounds of demurrer: *To the first count*—1st, "because it fails to allege in what respect or particular said saw was out of order, unsafe, and unfit to be used in said business;" 2d, "because it fails to show that said saw was originally unsafe and unfit to be used in said business, by reason of inherent defects in its make or construction, or that it became out of order, unsafe and unfit to be used in said business, by reason of the use and working of the same;" 3d, "because it claims that plaintiff's alleged injuries were caused by the wrong and gross negligence of the defendant, and fails to point out in what respect this defendant was guilty of any wrong and gross negligence in running said saw." *To the second count*—1st, "because it shows that plaintiff suffered said alleged injuries by reason of the incompetency of his fellow-servants, and fails to show which of his fellow-servants was incompetent to run said saw and engine;" 2d, "because it fails to allege that said alleged injuries were occasioned without the fault or neglect of the plaintiff;" 3d, "because it fails to show that defendant's servants, employed to run said saw and engine, were incompetent and unfit to perform that duty, and that plaintiff sustained said alleged injuries because of the want of skill and competency of said servants." *To the third count*—1st, "because it fails to allege that defendant's said servants, employed to run said saw and engine, were incompetent and unfit to discharge or perform that duty, and that defendant knew this before said alleged injuries occurred;" 2d, "because it fails to allege that plaintiff's said alleged injuries were occasioned by reason of the improper or unskillful running or management of said engine and saw;" 3d, "because, if defendant did not exercise due care in procuring fit and competent servants to run said saw and engine, still he is not liable to

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plaintiff, unless said alleged injuries were attributable directly to the improper or unskillful management and running of said engine and saw by such incompetent and unfit servants." The court overruled the demurrers, and the cause was tried on issue joined on the pleas of not guilty and contributory negligence, resulting in a verdict and judgment for plaintiff, for \$475.

The bill of exceptions purports to set out all the evidence, in substance as follows: The defendant owned a wood and coal yard, and used a circular saw, operated by a steam-engine, for the purpose of cutting the wood into proper lengths. The wood to be sawed was placed on a small table by the side of the saw, the top of which moved on a slide, and which was pushed forward by the person feeding the saw, while he held the stick of wood firmly against a brace-board on the top. The plaintiff had been in the employment of the defendant, driving a cart, in and about the yard, for seven or eight years; but he had never undertaken to run or feed the saw. On the morning of February 11th, 1885, as he testified, when he reported for duty, Mr. Frank Penny, the general manager of the yard, "told him to give up his cart and mule to one Atkinson, and get up steam, and saw wood that day; that he did not know how to use or manage the saw, and had never sawed wood before; that neither Mr. Penny nor any one else showed him how to manage the saw; that he used the saw as carefully as he could, and, after sawing about a half-hour, thought the saw struck a knot, or hard piece in the stick of wood he was holding on the table; that the saw was dull, and not sharp enough to cut through it, and jerked the wood suddenly from the table, pulled his right hand against the saw, and the saw then cut his hand, and disabled it so that he can only use his thumb." Penny, the superintendent of the yard, was examined as a witness for the defendant, and testified that, on said 11th February, "he received a rush of orders for wood and coal, and was short of hands; that he then employed one Atkinson to run the saw, who was just going to work when plaintiff asked him (witness) to let him run the saw that day; that he asked plaintiff if he knew how to manage it, and plaintiff replied that he knew all about sawing wood; that he then told plaintiff he did not care who run the saw, so that he got the wood sawed in time, and told him to give his cart and mule to said Atkinson and go to work." Plaintiff himself testified, also, "that he was perfectly sober, and had not drank any intoxicating liquor that morning;" but one of defendant's witnesses stated, that he saw him take one drink of whiskey, and when he went to the saw to commence work, another servant told him, "that he did not understand the saw, and would get hurt; that the old engine was not so good, and he had better not fool with it;" and that he told



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plaintiff this, "because, from the way plaintiff was acting, he thought he was under the influence of liquor and worked awkwardly."

As to the quality and condition of the saw at the time of the accident, plaintiff testified, "that when he commenced sawing he did not know whether the saw was sharp or not, and knew nothing about the saw; that defendant had, up to February 1st, kept one Julien to superintend the work at the yard, and also to look after the saw and machinery, and to keep the saw sharp and in proper condition; but that since February 1st, when Julien left, there had been no one regularly employed to look after the saw and engine." Said Julien, who was examined as a witness for plaintiff, testified that "the defendant's engine, saw and machinery were of the best make and pattern, and were in good order and condition on said February 1st, when he left defendant's service; that he has since seen it running almost every day, and has not discovered any break or defect in it or any part of the machinery; that he never let any one attend to the saw, without first showing him how to saw the wood, and how to hold it on the table; that it is dangerous to feed the saw, unless the feeder understands how to do it, and is very careful in doing so; that when the saw strikes a knot in sawing, it has a tendency to jerk the wood off the table, unless held very firmly; that a dull saw would make more resistance in cutting, and would require that the wood be held down more firmly, than if the saw was sharp; that he sharpened the saw once or twice a week, and sometimes oftener, depending on the amount and character of the work done; that it was sometimes necessary to sharpen it almost every day; and that he considered it necessary for the safety to have some one who understood the business to superintend the machinery and look at it every day or two, to see that the saw was in proper condition, and to sharpen it when needed." Frank Penny, who succeeded said Julien as superintendent at the yard, and who was examined as a witness on the part of the defendant, "testified that the saw and engine, and all the machinery pertaining to the same, were in good condition and running order on the day the plaintiff was cut, and on the day before, and has been ever since; that it always run steady and plumb, and was sharpened by the man regularly employed to saw wood; that it was usually sharpened every three or four days, according to the quantity and quality of wood cut on it; and that plaintiff was sawing a stick of black-jack wood when he got his hand cut."

On this evidence, the court charged the jury, at the instance of the plaintiff, as follows: "If the jury believe that the saw was out of order, and more dangerous than a sharp saw by reason of not being properly sharpened; and that the dullness

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of the saw caused the injury; and that this was unknown to the plaintiff; and that it would have been known to the defendant, but for the want of reasonable care and diligence in keeping the saw in proper condition; then they ought to find for the plaintiff." The defendant excepted to this charge, and requested the court, in writing, to instruct the jury, "that they must find for the defendant, if they believed the evidence;" and he duly excepted to the refusal of this charge.

The overruling of the demurrers to the complaint, the charge given, and the refusal of the charge asked, are now assigned as error.

L. H. FAITH, for the appellant.—(1.) The complaint was defective in the several particulars pointed out by the demurrers.—Wood's Master and Servant, 754, 803; *Campbell v. Railroad Co.*, 53 Geo. 488; *Railroad Co. v. Barber*, 5 Ohio St. 541; *Moss v. Railroad Co.*, 8 Amer. Rep. 126. (2.) The charge given by the court is faulty and erroneous, because it does not limit the belief and conclusions of the jury to the evidence before them; and because it assumes that the saw was not properly sharpened, when there was no evidence to that effect; and because, if there was evidence to show that fact, its sufficiency should have been left to the jury.—*McDougald v. Rutherford*, 30 Ala. 260; *Herges v. The State*, 30 Ala. 45; *Jones v. Fort*, 36 Ala. 449. (3.) On the evidence adduced, all of which is set out in the bill of exceptions, the plaintiff showed no cause of action, and the general charge asked ought to have been given.—*Whittaker v. Coombs*, 14 Bradw. Ill. 198; *Smoot v. Railway Co.*, 57 Ala. 18; Wood's Master and Servant, 682, 686, 692, 698, 741; 2 Amer. Rep. 497; 3 Amer. Rep. 143; *Baker v. Railroad Co.*, 68 Geo. 699; 91 Illinois, 474; 89 Illinois, 141; 40 Mich. 247; 28 How. Pr. 472; 3 Hurls. & Nor. 258; 25 N. Y. 566; 31 Cal. 376; 102 Mass. 572; 108 Illinois, 113.

G. L. SMITH, *contra*, cited the following authorities: (1.) As to the sufficiency of the complaint: *Thomas v. M. & O. Railroad Co.*, 42 Ala. 673; *M. & M. Railway Co. v. Crenshaw*, 65 Ala. 569; 2 Thompson on Negligence, 984, § 4. (2.) As to the correctness of the charge given, and of the refusal to give the general charge asked: *Smoot v. M. & M. Railway Co.*, 67 Ala. 17; *Thomas v. M. & O. Railroad Co.*, 42 Ala. 712; *Springer v. The State*, 58 Ala. 421.

STONE, C. J.—The complaint in this case is equally as full, explicit and direct, as the complaint in the case of *M. & O. R. R. Co. v. Thomas*, 42 Ala. 672. That complaint was

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demurred to, and, on very careful consideration, was held sufficient. Our Code forms are very brief, and in their phraseology, very general.—Code of 1876, §§ 2978–9. The demurrer in this case was properly overruled.—*Leach v. Bush*, 57 Ala. 145; *M. & M. Railway Co. Crenshaw*, 65 Ala. 566.

The appellant excepted to the charge of the court which was given at the request of the appellee, plaintiff below. It is here contended, that this charge is faulty, “in not limiting and confining the belief of the jury to the evidence before them.” We do not think there was any thing in this objection. The oath administered to the jury required them to render a true verdict according to the evidence; and to suppose they would entertain and act on any *belief* which was derived from sources other than the testimony, or the influences naturally and reasonably arising out of the facts proved, would be to impute to them a wicked disregard of their sworn duty, or great folly, which would show their unfitness for the trust confided to them. If counsel apprehended the jury would be misled by the instruction, it was a proper subject for an explanatory charge.—*O'Donnell v. Rodiger*, 76 Ala. 222.

A second criticism urged against this charge is, that it assumes as fact some things which rested for their establishment entirely on parol testimony, without referring the sufficiency of the testimony to the jury. We do not concur with counsel in this interpretation of the charge. To submit to the jury the inquiry, whether the saw was out of order, and more dangerous by reason that it had not been sharpened, is equivalent to inquiring of them whether the saw was dull, and whether dullness put it out of order, and rendered it more dangerous. There is nothing in this objection.

There was no error in refusing the general charge asked by defendant, that “if the jury believe the evidence they must find for the defendant.” That charge is proper only when there is no conflict in the testimony, and all tends to prove certain facts, which, if found, necessarily lead to the result claimed; or, second, when conceding the existence of every fact which can be found or inferred from the testimony favorable to one of the parties litigant, the other party is entitled to a verdict. This latter phase of the principle arises, when the plaintiff, after introducing all his testimony, fails to make a case which the law deems actionable. It also arises when the plaintiff proves a *prima facie* case, or presents testimony which, if believed, makes a *prima facie* case for recovery, and the defense relied on, even if fully believed, is, in law, no defense to the action. It is for the reasons stated above that this form of charge is assimilated to a demurrer to testimony, and that it should never be given nor asked, when there is any discrep-



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ancy, no matter how slight, in the testimony bearing on any matter material to the issue.—1 Brick. Dig. 335, § 3; *Davidson v. State, ex rel.*, 63 Ala. 432; *Seals v. Edmondson*, 73 Ala. 295. The testimony of plaintiff, Posey, and of the witness Penny, as to the circumstances under which plaintiff was in control of the saw on the day of the injury, is not sufficiently in harmony, and not sufficiently free from conflict, to justify the giving of the general charge.

Affirmed.

## Shields v. Sheffield.

### *Action for Money and Received, between Tax-Collectors.*

1. *Sufficiency of complaint, in averment of time or number.*—When the plaintiff declares on a special count, although he might recover under the common counts, the material facts must be alleged with reasonable certainty of time; though it is not necessary to prove the precise time as alleged, unless it is matter of substance; and when an act is continuous in its nature, as extending through a given period of time, it is sufficient to state the period of its duration.

2. *Same; in action by tax-collector, for fees collected by successor.* The plaintiff, a late tax-collector, suing his successor for fees collected for services rendered by plaintiff, and declaring in a special count, must allege the year or years in which the services were rendered, or in which the moneys accrued to him; and also the number of notices served by him, for which he claims fees, or the number and names of delinquents; although a general averment would be sufficient, when necessary to prevent prolixity.

3. *Action by tax-collector against his successor, for fees collected.*—A late tax-collector may maintain an action against his successor for fees collected, on proof that the defendant acted as his agent, express or implied, in collection of the fees; or, without such agency, on proof that he performed the services for which specified fees were given by law, complying with all the requisitions of the statute, and that the defendant collected the fees.

4. *Same; estoppel against agent.*—If the defendant acted as the plaintiff's agent in collecting the fees, he would be estopped from denying the liability thereby fastened upon him, or asserting that plaintiff had not complied with the law; but the question of agency *vel non* should be submitted to the jury.

5. *Fees of tax-collector for notices to delinquents.*—Under the provisions of the act incorporating the port of Mobile, and providing for the government thereof (Sess. Acts 1878-9, p. 406, § 24), the tax-collector is not entitled to any fee for making a personal demand on delinquent taxpayers, but only where, not being able to find the delinquents, he leaves "written or printed notice at their place of residence;" and leaving such notice at any other place would not be sufficient, unless it is also shown that it was actually received by the defendant.

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APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by Wm. H. Sheffield, against Wm. A. Shields, and was commenced on the 15th June, 1885. The complaint contained the common counts for money had and received and on an account stated, and a special count claiming \$500, as follows: "For that heretofore, up to the 19th March, 1885, plaintiff was tax-collector of the port of Mobile, under and by virtue of an act of the General Assembly of Alabama, approved Feb. 11th, 1879, entitled," &c., "and while he was such tax-collector, duly exercising the duties and powers of said office, received from the president of the police board of said port, in pursuance of section 24 of said act, the tax-book therein provided for, with his certificate at the end, and his warrant thereto appended, authorizing and commanding plaintiff, as such tax-collector, to collect the taxes levied by said port in pursuance of said act; and plaintiff forthwith notified the public, by advertisement for thirty days in a newspaper published in said port, that he was ready to receive payment of the taxes so levied; and after thirty days had elapsed from the publication of said notice, plaintiff or his deputies, during the term of said office, made personal demand upon the delinquent tax-payers, for the amount of their taxes, and costs, due said port and collectible under said act; and when unable to find them, left written or printed notices at the place of residence of such tax-payers, requiring them to come forward and pay such taxes and costs immediately; and for giving such notices plaintiff became entitled to, and to collect, fifty cents for giving each such notice. After making said demand, and giving said notice, but before collecting all the said fees so due him therefor, plaintiff's term of office expired, and he went out of said office, to-wit, on the 19th day of March, 1885, and defendant, who had been duly elected as his successor to said office, and had duly qualified therefor, and had entered on the duties thereof, collected of the said tax-payers the said fees so due to plaintiff as aforesaid, to a large amount, to-wit, to the amount of \$500; that he so collected them under color and by virtue of his said office; and plaintiff has demanded the same of said defendant, and he refuses to pay the same. Wherefore plaintiff sues."

The defendant demurred to the special count, assigning the following as grounds of demurrer: 1st, "because said count fails to give the name or names of any of the parties from whom said collections were made, or with whom said notices were left or sent;" 2d, "because it is vague and indefinite, in that it does not show in what year or years the sums claimed by said plaintiff accrued to him, or in what year or years said services were rendered for which this suit is brought;" 3d, "because it fails

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to show that it was made the duty of this defendant to collect any fees for plaintiff, or that there was any agreement by this defendant to perform any services for said plaintiff, in the collection of his fees, or otherwise;" 4th, "because this defendant is the lawful tax-collector of the port of Mobile, and has been ever since March 19th, 1885, and, as such officer, is entitled in law to the fifty cents provided to be collected under said section 24, and he collected the same for himself, as his own fees." The court overruled the demurrers, and the general issue being then pleaded, and issue joined thereon, the trial resulted in a verdict and judgment for the plaintiff, for \$106.50.

On the trial, as the bill of exceptions shows, the plaintiff read in evidence the act incorporating the port of Mobile (Sess. Acts 1878-9, pp. 392-413), under the 24th section of which act he claimed the fees sued for in this action; and proved his own election and qualification as the tax-collector of the port during the years 1879-84, and up to March 19th, 1885, when he was succeeded by the defendant, to whom he then delivered the tax-books. He then proved that, after receiving the books himself, "he notified the public, by advertisement for thirty days in a newspaper published in Mobile, that he was ready to receive payment of the taxes levied for each of the said years, as required by said section 24; that when he turned said tax-books over to the defendant, as his successor, there was a large number of unpaid tax-bills for back taxes due for each of the years 1879 to 1884, inclusive, as shown by the books; that he did not turn over to defendant any tax-bills, but only the tax-books, from which the defendant obtained the names of the delinquent tax-payers, and the amount of taxes due by each for each of said years; that the books did not show that demand had been made upon any of the delinquent tax-payers, nor that any written or printed notices had been served by him upon any delinquent tax-payer; that he kept a private memorandum of this, which he did not turn over to the defendant, nor did he enter on the tax-books any charge of fifty cents against each delinquent tax-payer, for making such personal demand, or serving such written or printed notices, as required by said section 24;" and he also testified, "that there was no agreement or understanding between him and defendant that defendant should collect any fees for him on tax-bills for back taxes." It further appeared that, on plaintiff's demand for money collected by the defendant which was due for fees, defendant denied that he had collected any fees due to plaintiff, and furnished a list of all the tax-payers from whom he had collected fees; and at the time of this interview, as plaintiff's witness testified, no objection was raised as to any informality in the notices served or given by plaintiff. The plaintiff himself testified, with this



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list before him, that after the expiration of thirty days from his advertisement in the papers, "he made a personal demand on the several delinquents" whose names he marked on the list, "and left with each of them a printed notice requiring them to come forward and pay immediately;" and Thos. W. Williams, who was his chief deputy, testified in like manner to the service of notices on many others, whose names he could not remember. The defendant asked said Williams, on cross-examination, if he did not serve several of the notices, as to which he had testified, not on the tax-payer himself, although he resided in the port of Mobile, but on an agent; and particularly, if the notice for Mrs. Duggan was not served on L. Brewer, as her agent. The court refused to allow this question to be asked, unless the defendant would state that he expected to prove that the fees collected for these notices had been refunded to the persons paying them, or had been demanded by them; to which ruling the defendant excepted.

"The court charged the jury, among other things, that if they believed, from the evidence, that the plaintiff or his deputies, while he was tax-collector of the port of Mobile, gave the notices required by the 24th section of the act incorporating the port of Mobile, read in evidence before them, then he was entitled to the fifty cents for serving such notice; and if they further find, from the evidence, that after plaintiff ceased to be such tax-collector, defendant succeeded him in that office, and collected any tax-bills for back taxes, and with it also fifty cents from each tax-payer, then defendant would be liable to plaintiff for each such fifty cents so collected by him on all such tax-bills." To this charge the defendant excepted.

The overruling of the demurrer to the complaint, the rulings on evidence to which exceptions were reserved, the charge given, and the refusal of several charges asked, are now assigned as error.

McINTOSH & RICH, and L. H. FAITH, for appellant.

R. INGE SMITH, *contra*.

SOMERVILLE, J.—The count for money had and received would, no doubt, have been sufficient to cover every issue raised involving the rights of the litigating parties to the money in controversy. The plaintiff, however, elected to add another count, in which he states the facts upon which he bases his right of recovery. In doing this, he is required by the established rules of pleading, to state the facts or matter to be put in issue in an intelligible form, although such statement may be as brief as is consistent with perspicuity. It is a general rule,

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necessary for the proper understanding of the case by the court and jury, and to prevent surprise on the part of adversary litigants, that whatever is alleged in pleading must be alleged with reasonable certainty. Under this head falls the rule, that "pleadings must have certainty of time;" by which is meant, that the day, month, and year when each traversable fact occurred, must be stated, although matters of mere inducement and aggravation require no allegation of time. Nor need time be proved as alleged, unless in cases where it becomes matter of substance by reason of forming a material point in the merits of the case. Where, however, an act is continuous in its nature, as one extending through a given period of time, it is a sufficient compliance with the rule to state the period of its duration.—Stephen on Pleading, 292.

Under this rule, the plaintiff should have stated in what year or years the sums of money claimed by him accrued, or in what years the official services, upon which he bases his cause of action, were rendered by him in the capacity of a tax-collector. The second assignment of demurrer, raising this objection, should have been sustained.

The complaint fails, also, to allege any specific number of notices given by the plaintiff to delinquent tax-payers, or how many of such delinquents there were from whom he could lawfully claim a fee of fifty cents, or from whom the defendant collected such fee. This number may not have exceeded a half dozen, and the names of these may have been known with certainty to the plaintiff. If their number was so large that a mention of them would have led to great prolixity, a general mode of statement should have been allowed, without any enumeration of the specific names of delinquents. The purpose of this rule is to prevent the incumbering of the record with a prolix and useless multiplicity of details, in the statement of a cause of action, or of a defense. The first ground of demurrer was well taken, in view of this principle.—Stephen on Pleading, \*356, \*359, \*302.

The third ground pretermits the liability of the defendant which may have accrued in the event of his having proceeded to collect the fees in question, without protest or objection on the part of the tax-payers, although he was under no obligation to collect them, imposed either by law or by contract of the parties. This ground of demurrer was properly overruled.

The fourth ground was abandoned on argument at the bar, and needs no consideration. It was manifestly bad, and the court so pronounced it.

In order that the plaintiff, Sheffield, may be entitled to recover in this action, he must do so under one or the other of the two following state of facts:

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*First:* He must show that the defendant acted, expressly or impliedly, as his agent, in collecting the fees in controversy. In this event, the defendant would be estopped from denying the liability which would be fastened on him by reason of this relationship.

*Second:* If there was no such relationship, express or implied, the plaintiff must show that he was legally entitled to the fees for which he sues, by reason of having complied with the statute which gives the fee.

The first aspect of the case requires but little by way of elaboration. The question of agency, would be one of fact for the jury to determine, and should be submitted to them as such. If Shields acted as the agent of the plaintiff, and collected these fees for him, he could not subsequently set up any claim to them himself, nor deny that the plaintiff was entitled to them for failure to give the requisite notices, or for any other neglect of duty. He would be precluded from doing so, as we have said, by way of estoppel, even though the truth was to the contrary.

In the second contingency—that is, in the event of an agency being inferred—the plaintiff would not, in equity and good conscience, be entitled to claim any fee, unless he shows a compliance with the statute which authorizes him to charge such fee. He must derive his right from contract, or from law. If he fails to do either, he must be dismissed without recovery.

We entertain no doubt as to the proper construction of section 24 of the act approved February 11th, 1879, entitled “An act to incorporate the port of Mobile, and to provide for the government thereof,” under the provisions of which the present controversy has arisen. This statute clearly confers on the tax-collectors of the port of Mobile no authority whatever to charge a fee for making a personal demand upon delinquent tax-payers for the amount of their taxes and costs. The fee of fifty cents, specified in this section, is allowed only where, in the event of the collector’s being unable to find such delinquents, he leaves “a *written or printed notice* at the place of the residence of such tax-payers, requiring them to come forward and pay such taxes and costs immediately.” The statute declares, in so many words, that “for giving such *notice* the tax-collector shall collect fifty cents.”—Acts 1878–79, sec. 24, p. 406. Laws giving fees are *stricti juris*, and must be construed accordingly.—*Tillman v. Wood*, 58 Ala. 578.

The Circuit Court erred in refusing to allow the defendant to prove that some of the notices were not given by the collector in the manner required by statute. This ruling could be correct, only on the theory that an agency existed; and this the court had no right to assume as a fact conclusively proved. It



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is true that the jury may have inferred this fact from the conduct of the parties, but they may also have inferred the contrary.

The leaving of a written or printed notice with an agent of a delinquent tax-payer, at any other place than the residence of such delinquent, would not be a compliance with the law, unless it should be further proved that such notice was actually delivered to the person for whom it was intended.

The rulings of the court can be easily tested by these principles on another trial, it being kept in mind that no charge should be given by the court which would exclude from the jury either aspect of the case, which we have above discussed in the alternative.

The judgment must be reversed, and the cause remanded.

## Burke v. Blan.

### *Application for Mandamus to State Auditor.*

1. *Printer's fee for advertising sales of lands for delinquent taxes; when payable out of State treasury.*—Under the provisions of the act approved February 12th, 1879, amending section 439 of the Code (Sess. Acts 1878-9, p. 21), the printer's fee for advertising the sale of lands for delinquent taxes must be paid out of the State treasury, on the auditor's warrant in his favor, *only* when the State became the purchaser at the tax-sale, or when the fee has been collected and paid into the treasury.

2. *Same, for advertising notices to delinquent tax-payers.*—Under the provisions of the act approved February 12th, 1879, providing for the sale of lands for delinquent taxes (Sess. Acts 1878-9, pp. 1-7, §§ 3, 4, 10), the printer's fee for advertising notices to delinquent tax-payers is required to be ascertained by the judge of probate, and included in the amount for which a decree of sale is rendered, and is made payable out of the proceeds of sale; but, when the State becomes the purchaser, the auditor is not required to draw his warrant on the treasurer in favor of the printer, except on the production of an order by the judge of probate.

APPEAL from the Circuit Court of Montgomery.

Tried before Hon. JOHN P. HUBBARD.

This was an application by petition, by W. J. Blan, for a *mandamus* directed to M. C. Burke, auditor of public accounts, requiring that officer to draw his warrant on the State treasurer, in favor of the petitioner, for \$193, a balance claimed to be due to the petitioner as compensation for printing and publishing, under agreement between him, the tax-collector and the probate judge of Lowndes county, during the year 1884,

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notices to delinquent tax-payers, and advertisements of the sale of lands for delinquent taxes. The petition was filed on the 22d June, 1885, and was verified by the affidavit of the petitioner. The amount of the petitioner's original account, as presented to Auditor Carmichael, the predecessor of said Burke, was \$893, being \$471.50 for the publication of notices to delinquents, and \$421.50 for advertisement of sales of land for delinquent taxes under decrees of the probate judge. The account was audited by said Carmichael, and \$700 being allowed, he drew his warrant for that sum in favor of the petitioner. The object of the present proceeding was to compel said Burke, as auditor, to again audit the account, and allow the balance of the claim, \$193. The defendant filed an answer to the petition, in which he stated the facts on which he based his refusal to draw his warrant for the sum claimed. It was admitted on the hearing, as the bill of exceptions states, that the notices published by the petitioner were 237 at the first insertion, 232 at the second, and 223 at the third; that the number of parcels of land advertised for sale, under decrees of the judge of probate, were 212 at the first insertion, 206 at the second, and 205 at the third; "that the State bought in, of the lands so advertised, only 175 parcels; that no certificates of the sale and purchase of any other parcels by the State have ever been on file in the office of the defendant as auditor, or were ever made by the tax-collector; and that no money for the costs of advertising said 175 parcels, or the other lands set out in said advertisement, have ever been paid into the State treasury, or collected by said tax-collector." On the admitted facts, the court granted a peremptory *mandamus*; and this ruling and judgment, to which the defendant duly expected, is now assigned as error.

THOS. N. McCLELLAN, Attorney-General, for appellant.

TROY, TOMPKINS & LONDON, *contra*.

CLOPTON, J.—Section 439 of the Code required the tax-collector to charge and collect the price of advertising land for sale for delinquent taxes. Under this statute, the State, unless it became the purchaser of the land, was under no liability or obligation to pay the price of advertising. The publisher was paid by the collector. The section was amended by the act of February 12th, 1879. The amendatory act provides: "The collector must charge and collect, in addition to fees, forfeitures and costs, on each tract, the price for advertising the same for sale, and shall pay over the amount collected for advertising such sales into the treasury of the State; and the auditor of the

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State shall audit the account of such publisher for such advertisement, and where the State has become the purchaser of lands at such tax-sale, and draw his warrant in favor of such publisher on the treasurer of the State, for the amount he may find to be lawfully due such publisher; and the treasurer shall pay the same; and the provisions of this section shall apply to all cases where such tax-collector has heretofore collected the price of advertising as aforesaid, and has not paid it over to such publisher."—*Acts* 1878-9, 21. It is contended for petitioner, that the purpose and operation of the amendatory act are, to impose upon the State an unconditional liability to pay the price of advertising all the lands for sale, notwithstanding the collector may fail to collect and pay the money into the treasury, and the State may not be the purchaser.

It will be conceded, that the State, by requiring the collector to pay the money into the treasury, deprives him of authority to pay the publisher the price of advertising the lands. The last clause imposes the same duty as to the price of advertising theretofore collected, and not paid to the publisher. A construction of the statute, which operates to impose a liability on the State not previously existing, should not be adopted, unless such liability is expressly declared, or necessarily implied,—the equivalent of a promise or assumption. For reasons deemed sufficient by the General Assembly, direct payment by the collector to the publisher was considered impolitic; and the treasury of the State is constituted the depository of the money collected for the cost of advertising. Having undertaken the reception of the money, and having assumed the duty to ascertain and pay, through the proper officers, the amount which may be found to be lawfully due the publisher, the liability is co-extensive with the duties, but does not extend further than is necessary to complete the performance. The State does not undertake to enforce the payment of the money into the treasury by the collector. The law charges him with the duty, and, on his failure to discharge it, affords the publisher, as the person injured, redress by suit on his official bond.—*Code*, § 179. From the construction of the statute insisted on, the logical sequence is, that the obligation of the State is tantamount to a guaranty, in favor of the publisher, that the collector shall collect and pay into the treasury the cost of advertising, or, on default, the State will pay such cost. In such case, auditing the account, to ascertain the amount *lawfully* due, would necessarily involve an investigation of the cause of such default,—whether the price of advertising could have been collected by reasonable diligence, or, if collected, whether there is any legal and sufficient excuse for the omission to pay it over; substantially a controversy and litigation between the State and the publisher.

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A comparison of the different provisions of the statute, though some of them are awkwardly expressed, reasonably shows an intention to provide for payment out of the treasury of the State in two cases only—where the money is paid therein by the collector, and where the State becomes the purchaser; the obligation resting, in one case, on the actual possession of money, required by law to be paid into the treasury, which *ex æquo et bono* belongs to the publisher; and in the other, on the retention of the proceeds of sale, which include the price of advertising. The account of the publisher is required to be audited in two instances, which are separate and distinct, and placed in juxtaposition—“and the auditor of the State shall audit the account of such publisher for such advertisement, and where the State has become the purchaser of lands at such tax-sale.” The requirement that the auditor shall audit the account “for such advertisement,” immediately follows, is connected with, and relates to the provision, that the collector must collect the price of advertising the lands for sale, “and shall pay the amount collected for advertising such sales into the treasury of State.” If it is intended that the provision, that the auditor shall audit the account of the publisher for such advertisement is general, and refers to and includes the price of advertising all the sales, irrespective of the provision that the amount collected shall be paid into the treasury, the special and additional provision, that the account shall also be audited when the State has become the purchaser, is superfluous, and without operation. Construing the statute so as to make the different provisions congruous, and give effect to every clause, leads to the conclusion, that the State incurs no liability for the price of advertising beyond the proper disbursement of the amount actually paid into the treasury, and where the State becomes the purchaser.

The petition further claims for advertising notices under the third section of the “act to provide for the sale of land and other real estate for delinquent taxes, and the redemption thereof.”—Acts 1878-9, 1. The tenth section, after regulating the costs of the judge of probate and of the collector, provides: “Said costs, and the *cost of advertisement*, shall be paid out of the proceeds of sale, on an order by the judge of probate.” The statute contemplates, that the costs of advertisement shall be included, with the other costs and charges, in the amount for which the court ascertains the State has a lien, and for the payment of which the land is condemned to be sold. The judge of probate only can properly certify the sum included in the decree, as the price of publishing the notice; and on his order, the collector ordinarily pays the publisher out of the proceeds of sale, the exclusive fund from which the statute provides the costs shall be paid. It is insisted, that the State

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should pay the cost of publishing the notices, because the proceedings under the statute are instituted by and on behalf of the State, and the publication is made by request of the judge of probate, on whom is devolved the duty of giving notice. The appeal should be addressed to the legislature. Without statutory authority, costs can not be adjudged against the State; and the general statutes have no operation, where there is an express designation of the fund, from which the costs are to be paid.—*Governor v. Powell*, 23 Ala. 579. When the land is purchased by the State, the proceeds of sale do not go into the hands of the collector, but are retained in the treasury. The cost of advertising the notice, in such case, can be paid only on the warrant of the auditor.—Code, § 85. His duty, therefore, to audit the account, and draw his warrant for the amount lawfully due to the publisher, comes within the spirit and equity of the statute, though not expressly provided. But the duty does not arise, and the auditor is without authority to audit the account for publishing the notice as to the land purchased by the State, unless on the production of the order by the judge of probate required by the statute. Such order is evidence of the correctness of the items and amount of the account, and that it was included in the decree of sale, which the publisher is required to present.

On the agreed facts, the petitioner has been paid all which he is entitled to receive or claim from the State.

Reversed, and judgment will be here entered dismissing the petition.

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### *Statutory Action in nature of Ejectment.*

1. *Title of purchaser at sale under execution.*—To authorize a recovery on a sheriff's deed, the grantee must show a judgment, execution, levy, sale and conveyance, though the recitals of the deed may make a *prima facie* case as to some of these facts; and the deed does not convey any greater estate or interest than it assumes and purports to convey, although the defendant in execution in fact had a greater interest subject to levy and sale.

2. *Conveyance by husband to wife, during coverture.*—A conveyance of lands by the husband, "to the sole and proper use, benefit and behoof of" his wife, her heirs and assigns, is a mere nullity at law, neither transferring to her any legal estate or interest, nor divesting the title out of himself.

3. *Same; tenancy by curtesy, in legal and equitable estates.*—When the husband conveys lands to the wife, during coverture, to her sole and

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separate use, and she dies after issue born alive, if he is tenant by the curtesy (which is not decided), it is only of an equitable estate; and a purchaser of that interest, under execution sale against him, does not acquire a title on which he can maintain an action of ejectment.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This action was brought by W. E. Richardson against Letitia Carrington, to recover the possession of a city lot in Mobile, particularly described in the complaint; and was commenced on the 16th January, 1885. The plaintiff claimed under a purchase at sheriff's sale, under execution against Richard Walker; and he produced the judgment, execution, levy, and sheriff's deed, which recited a sale under the execution on the first Monday in August, 1884. The defendant was the daughter of said Richard Walker by Alice Walker, his wife; and was in possession of the premises, claiming title as devisee under the will of her mother, which was duly probated in September, 1883; and under a conveyance to her mother by said Richard Walker, which was dated June 22d, 1875, and by which the premises were conveyed "to the sole and proper use, benefit and behoof of" the said Alice Walker, her heirs and assigns. On the admitted facts, the court charged the jury, on request of the plaintiff, that they must find for him if they believed the evidence. The defendant excepted to this charge, and here assigns it as error.

L. H. FAITH, for the appellant.—The deed of Richard Walker to his wife created in her an equitable estate, leaving only the legal title in himself as her trustee.—*Copeland v. Kehoe*, 57 Ala. 246; *Goodlett v. Hansell*, 66 Ala. 158; *Davidson v. Lanier*, 51 Ala. 318; *McMillan v. Peacock*, 57 Ala. 127; *Helmetag v. Frank*, 61 Ala. 67; *Crockett v. Lide*, 74 Ala. 304; *Short v. Battle*, 52 Ala. 456. This legal title was not subject to sale under execution against the husband, nor was it sold. *Lide v. Crockett*, 74 Ala. 304; *Morris v. Zeigler*, 71 Penn. St. 450; *Phillips v. Wooster*, 36 N. Y. 412. On the death of the wife, having devised the land, the legal and equitable title united and vested in her devisee. 2 Halst. N. J. 142; 26 Md. 5; 11 Md. 492; 12 Md. 158; 13 Md. 348; 17 Ala. 636, 743; 18 Ala. 690; 21 Ala. 458; *McBrayer v. Cariker*, 64 Ala. 50. The sheriff's deed purports to convey only the defendant's title as tenant by curtesy, and it can have no other or greater effect.—*Sheppard v. Simpson*, 1 Dev. N. C. 237; *Carpenter v. Cameron*, 7 Watts, 51; Murphree on Sheriffs, § 997; 6 Cowen, 720; 11 Barb. 173; 1 John. Cases, 284. But the defendant had no estate by curtesy, and therefore nothing passed by the sheriff's deed.—*Breeding v. Davis*,



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77 Va. 639, or 46 Amer. Rep. 740; *Ilitz v. National Bank*, 111 U. S. 731; *Wallace v. Bassett*, 41 Barb. 92; 2 Lans. 21; 53 Ill. 495; 79 Ill. 103; *Stewart v. Ross*, 50 Miss. 776; 10 Allen, 94.

WM. E. RICHARDSON, and with him MCINTOSH & RICH, *contra*. The conveyance by Richard Walker to his wife transferred only an equitable interest, and is a nullity at law.—*McMillan v. Peacock*, 57 Ala. 129. The husband is entitled to an estate by curtesy in lands held by his wife as an equitable estate. *O'Connor v. Chamberlain*, 59 Ala. 439; *Short v. Battle*, 52 Ala. 463; *Watts v. Ball*, 1 P. W. 109; *Cooper v. McDonauld*, 7 Law Rep., Ch. Div. 297; *Roberts v. Dixwell*, 1 Atk. 607; 1 Washb. Real Property, 149–51; *Morgan v. Morgan*, 5 Madd. 408; Roper on H. & W. 18–20; Lewin on Trusts, 624; 14 Sim. 125; *Payne v. Payne*, 11 B. Mon. 138; Schouler's Dom. Rel. 196; *Porch v. Fries*, 18 N. J. Eq. 209. This estate of the husband became perfect on the death of the wife, and was not defeated by the devise contained in her will. *Smoot v. Lecatt*, 1 Stew. 590; 2 Hill, N. Y. 554; *Mullany v. Mullany*, 3 Green's Ch. (31 Amer. Dec.) 238; *Ege v. Medlor*, 82 Penn. St. 86; *Frazer v. Hightower*, 12 Heisk. 94; 18 N. J. Eq. 208; *Baker v. Chastang*, 18 Ala. 423; *Norton v. Ladd*, 5 N. H. 205; *Osgood v. Breed*, 12 Mass. 225; *West v. West*, 10 S. & R. 445. The estate by curtesy was liable to levy and sale under execution.—*Cheek v. Waldrum*, 25 Ala. 152; *Brevard v. Jones*, 50 Ala. 238.

STONE, C. J.—Under an execution issued from the Circuit Court of Mobile county, on a judgment recovered in said court in favor of Bernard Moog, and against Richard Walker, the sheriff of Mobile county made, and entered on said execution, a levy on the lot sued for, indorsing his levy in the following language: "I levied this execution on all the right, title and interest of Richard Walker, in and to the following described real estate, with the improvements thereon" [Here follows a description of a lot, not sued for in this action]; "also, the interest of R. Walker, being his curtesy, in the house and lot in the city of Mobile;" describing the lot sued for in this statutory real action. This levy bears date July 3, 1884. On August 4, 1884, the sheriff executed a deed of conveyance to Richardson, plaintiff in this action. The deed, after reciting the levy, advertisement and sale of the property, and the purchase by Richardson and payment of the purchase-money, conveyed to him the lot in controversy, in the following language: "The interest of R. Walker, being his curtesy, in the house and lot," &c.

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To authorize a recovery on a sheriff's title, there must be a judgment, execution, levy, sale and conveyance. The proof of these several facts may not rest on the plaintiff in the first instance. The recitals in the deed make a *prima facie* case of some of these essential facts. Still they are all essential; and if any of them do not in fact exist, title is not acquired by the purchase.—*Ware v. Bradford*, 2 Ala. 676. No one will contend that, in the absence of the sheriff's deed, title would be transferred. The sheriff is the agent, or instrument of the law, by whom, in certain conditions, title is divested out of the judgment-debtor, and vested in the purchaser. The conditions existing, a sheriff's deed is as effective as a conveyance, as if the judgment-debtor had himself conveyed. But it can not be more effective. It does not, and can not, convey any greater quantity of land, or any greater interest in the land, than it assumes or purports to convey, any more than a private conveyance will be construed to convey a greater interest than it expresses on its face. If it convey a partial, defined interest, it leaves the residue of defendant's title or property where it found it; and it matters not that a greater interest might have been sold and conveyed. The inquiry is not alone what interest or title had the defendant in execution, which could have been seized and sold. It goes farther, and inquires to what extent has that interest been levied on, sold and conveyed; and when the deed expresses that only a particular estate, or partial interest has been sold, this is a negation that any other estate or interest is conveyed, or intended to be conveyed. *Expressum facit cessare tacitum*. These principles are fully supported by the following authorities, if authority for so plain a proposition be necessary: *Carpenter v. Cameron*, 7 Watts, Pa. 51; *Sheppard v. Simpson*, 1 Dev. Law, 237; *Herman on Executions*, 479–89. See, also, *Murphree on Sheriffs*, § 997.

Tenancy by the curtesy is a well known species of freehold estate in lands, recognized in all the States having a common-law origin, unless changed by statute. It is a life estate in the surviving husband of a deceased wife, and to authorize its assertion, there must be a marriage, seizin by the wife during the coverture of an estate of inheritance, and birth of a living child, offspring of the marriage, capable of inheriting. This is the species of estate levied on, sold and conveyed in this case; and if Walker, the defendant in execution, was legally seized of such estate, then Richardson, the plaintiff, was entitled to recover. If there was no such seizin, he purchased nothing, and should not have recovered.

The plaintiff made claim of title as follows: A deed was made by Richard Walker to his wife, Alice Walker, bearing

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date June 22, 1875, conveying to her directly the lot in controversy, with a *habendum* clause in the following language: "To have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to the sole and proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever." At the time this deed was executed, the grantor and grantee were husband and wife, and there had been issue of the marriage born alive—the defendant in the present suit. Mrs. Walker, the grantee, had died before the levy was made. Before her death, Mrs. Walker made her last will and testament, which was admitted to probate in September, 1883. By her said will, she gave and bequeathed the property in controversy to her daughter, Letitia Carrington; and against her this action is prosecuted.

If, under the execution against Walker, the levy in this case had been general, or upon the estate and interest of the said defendant, Walker, and the sale and conveyance had been in accordance with the terms of the levy, we are not prepared to deny the plaintiff would have shown a right of recovery. The conveyance by Walker to his wife was, in law, a mere nullity, and did not and could not transfer the legal title, or divest it out of him.—*McMillan v. Peacock*, 57 Ala. 127; *Helmetag v. Frank*, 61 Ala. 67; *Goodlett v. Hansell*, 67 Ala. 151; *Powe v. McLeod*, 76 Ala. 418; *Washburn v. Gardner*, *Id.* 597; *Loeb v. McCullough*, 78 Ala. 533; *Loeb v. Manasses*, *Id.* 555.

The right of Mrs. Walker, then, under the largest interpretation, was but an equitable estate or right, having no recognition in a court of law. If we concede that Mr. Walker became tenant by the curtesy, he could only succeed to such title as was in his wife—a tenancy of an equitable estate. And, purchasing at execution sale, Mr. Richardson did and could acquire only the title or right which Walker had held. The stream can not rise above its source. Acquiring, then, at most, only an equitable estate, Richardson can not maintain an action at law upon such a title.—*You v. Flinn*, 34 Ala. 409, 415, and the authorities cited: *Lehman, Durr & Co. v. Bryan*, 67 Ala. 558; *Tutwiler v. Munford*, 73 Ala. 308; *Downing v. Blair*, 75 Ala. 216.

What we have said above is, perhaps, decisive of this case. It does not touch the question, whether or not Walker became seized, as tenant by the curtesy, of the estate or interest Mrs. Walker had held. That question may become material before another tribunal, and in another form of proceeding. It has been very fully and carefully argued, with a zeal that indicates earnestness of conviction.

There are cases which hold, that the mere fact that the wife's



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real property is secured to her sole and separate use, does not, without more, bar the husband of his curtesy, the other conditions concurring. *Morgan v. Morgan*, 5 Madd. Rep. 408, and *Mullany v. Mullany*, 3 Green's Ch. 16, are of this class. Other cases are mentioned in the brief of counsel. In *Smoot v. Lecatt*, 1 Stew. 590, there was an antenuptial agreement, by which the intended husband renounced "all claim, right, title, or interest to any part or parts of the estate . . . in right of the said A. S., his intended wife; she to retain the property, of what nature soever, for her own use and benefit." It was held this did not bar curtesy; but there was not a full court, and there was a well-reasoned dissenting opinion. It is difficult to conceive how the words employed can be construed as creating a separate estate in the wife. It would rather seem that they were an agreement by the husband, made in the treaty for marriage, and therefore binding on him, to renounce all property rights which would, in their absence, accrue to him as the result of the marriage. In other words, that he would not assert his marital rights. Thus interpreted, his marital rights and marital dominion never did accrue, and it would seem none of his rights, as such, ever could accrue.—*Machen v. Machen*, 15 Ala. 373; same case, 38 Ala. 364. We have other cases which assert the doctrine declared in *Smoot v. Lecatt*, but they are *dicta*. In the case of *Grimball v. Patton*, 70 Ala. 626, 635, is a *dictum* the other way, with a statement of some of the reasons on which it is based. There are other reasons against the doctrine asserted in *Smoot v. Lecatt*, not the least of which is the principle declared in *Cheek v. Waldrum*, 25 Ala. 152, and re-asserted in *Brevard v. Jones*, 50 Ala. 221, 238, that there accrued to the husband, by virtue of the marriage, "a life interest [in the wife's real estate], as tenant by the curtesy, after issue born, all of which could be sold away from her for the payment of his debts." How can this liability of the wife's property to be immediately sold away from her by the husband, or by the sheriff in payment of his debts, be harmonized with the provisions of the deed, which secured to Mrs. Walker, her heirs and assigns, the enjoyment of the property to "her sole and proper use, benefit and behoof."

Another inquiry: The conveyance is to Mrs. Walker, "her heirs and assigns." She devised the property by her will to Mrs. Carrington, her daughter. Is not this within the very letter of the deed, which empowers her to assign the property?

But the doctrine announced in *Smoot v. Lecatt*, *supra*, is by no means of universal acceptance. See *Bennet v. Davis*, 2 Peere Wms. 316; *Hearle v. Greenbank*, 3 Atk. 695, 716; *Taylor v. Meads*, 4 DeGex, J. & S. 597; *Pool v. Blakie*,

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53 Ill. 495 ; *Stokes v. McKibbin*, 13 Penn. St. 267 ; *Rigler v. Cloud*, 14 Penn. St. 361 ; *Cochran v. O'Hern*, 4 Watts & Serg. 95 ; 1 Washb. Real Property, 130. And, in conclusion, may we not well inquire, if there is not something in the changed policy of our laws, which has installed the wife, in her right to hold property, as the peer of her husband ? The question last considered, however, not being necessary to a decision of the present case, is not intended to be decided. The foregoing are but the announcement of my individual impressions, and are not intended to preclude further consideration of the question.

Reversed and remanded.

## **Hornthall, Whitehead, Weissman & Co. v. Schonfeld.**

### *Bill in Equity by Creditors to set aside Fraudulent Conveyances.*

1. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—A sale of his property by an insolvent debtor, at a fair and adequate price, in absolute payment of an honest debt, without reserving any benefit whatever to himself, will be sustained by the courts as a valid exercise of his right of preference, although made with a fraudulent intent on his part, of which the purchasing creditor was cognizant.

2. *Same; fraudulent purchase of goods by insolvent debtor, and subsequent transfer.*—When an insolvent debtor obtains goods on credit by misrepresentation or fraudulent concealment of his condition, the seller may disaffirm the sale, and reclaim the goods, as against the fraudulent purchaser, or any one claiming under him with notice of the fraud ; but he can not maintain a bill in equity to set aside a subsequent transfer of the goods on account of such fraud, when the transfer was made in absolute payment of an honest debt, a fair price allowed for the goods, and no benefit reserved to the insolvent debtor.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 7th December, 1883, by the several appellants, as creditors of Sigmund Vogel, deceased, against Mrs. Caroline Schonfeld, Henry Bernstein, and others ; and sought, principally, to set aside a conveyance of his stock of goods made by said Vogel to Mrs. Schonfeld and said Bernstein, on the ground that it was fraudulent as against the complainants and other creditors, to make the said defendants account for the proceeds of sale of such goods as they had

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disposed of, and to have the residue subjected to sale for the satisfaction of the complainants' debts. On final bearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

G. L. SMITH, for the appellants.—(1.) S. Vogel, while insolvent, bought goods from complainants on credit, under false representations of solvency; a large part of the goods so purchased being afterwards conveyed by him to Bernstein and Mrs. Schonfeld, who were cognizant of all the facts at the time the conveyance was executed. That this was an actual fraud perpetrated on the complainants by Vogel, is settled by the adjudged cases.—*Loeb & Bros. v. Flash Brothers*, 65 Ala. 538; *Loeb & Bros. v. Peters & Brother*, 63 Ala. 249; *Smith v. Sweeney*, 69 Ala. 527; *Donaldson v. Farwell*, 93 U. S. 633. A purchase of these goods, by a person having knowledge of the facts, is also void for actual fraud.—Authorities above cited; also, *Lehman, Durr & Co. v. Kelly*, 68 Ala. 192. Bernstein and Mrs. Schonfeld knew of these fraudulent purchases by Vogel, and that the goods so purchased by him were part of the stock conveyed to them by him; and they are chargeable with participation in Vogel's intentional fraud. If the conveyance was intentionally fraudulent as to one creditor, it is void as to all; and being fraudulent in part, by reason of an actual intent to hinder, delay, and defraud creditors, the entire conveyance is void.—*Lehman, Durr & Co. v. Kelly*, 68 Ala. 203; *Tatum v. Hunter & Thomas*, 14 Ala. 557; *Wiley, Banks & Co. v. Knight*, 27 Ala. 349; *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 213. When a debtor, though insolvent, sells his own property in payment of an honest debt, no fraud can exist, for it is his duty so to apply it (*Crawford v. Kirksey*, 55 Ala. 282); but this principle can not be invoked by his fraudulent grantees, against the creditors whom he has defrauded, and who have a right to pursue and recover the goods obtained from them by his fraud. (2.) As against the complainants' existing debts, the burden of proving the *bona fides* of the conveyance was on the defendants.—*McCain v. Wood*, 4 Ala. 258; *Br. Bank at Decatur v. Kinsey*, 5 Ala. 9; *McCuskle v. Amerine*, 12 Ala. 17; *Falkner v. Leith & Jones*, 15 Ala. 9; *Dolin v. Gardner*, 15 Ala. 758; *Gordon, Rankin & Co. Tweedy*, 71 Ala. 212; *Lipscomb v. McClellan*, 72 Ala. 159; *Buchanan v. Buchanan*, 72 Ala. 57; *Hamilton v. Blackwell*, 60 Ala. 547; *Pickett v. Pipkin*, 64 Ala. 524. The conveyance being between near relatives, the rights of creditors are jealously guarded, and some proof of the disposition of the money by the debtor must be made.—*Harrell v. Mitchell*, 61 Ala. 278; *Hubbard v. Allen*, 59 Ala. 296; *Mar-*



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*shall v. Croom*, 60 Ala. 128; *Barnard v. Davis*, 54 Ala. 574; *Thames & Co. v. Rembert*, 63 Ala. 561; *Vincent v. State*, 74 Ala. 274. It appears that part of the consideration was debts amounting to \$7,500, for money obtained by Vogel within one month prior to the conveyance, \$3,500 within two months, and \$2,500 within four months; and no effort is made to show what Vogel did with this money, although the defendants are in possession of all his books and papers. Another item of the consideration is an alleged debt of \$10,000 due to Mrs. Schonfeld, but no account of items is produced. *Enders v. Swain*, 8 Dana, 103; *Harvey v. Nugent*, 13 Wise. 283. If any part of this consideration, even as to one of the grantees, was fictitious, it vitiates the whole conveyance. *Seaman v. Nolan*, 68 Ala. 463. When the conveyance was executed to Bernstein and Mrs. Schonfeld, Vogel was indebted more than \$40,000, by notes on which their names appear as indorsers; and though they now repudiate these indorsements, and denounce them as forgeries, the evidence shows that they were made by Vogel with their knowledge and consent, and as part of a joint scheme to defraud his creditors. The record abounds with proof of other badges of fraud.

OVERALL & BESTOR, *contra*.—The validity of the sale attacked in this case is conclusively established, when tested by the principles laid down in several late decisions of this court. The property of an insolvent debtor has been devoted to the payment of honest debts, at a fair and adequate price, and no reservation of a benefit to the debtor. These concurrent facts rebut all inferences of fraud, and impart validity to the conveyance as an allowable preference.—*Hodges Bros. v. Coleman & Carroll*, 76 Ala. 103; *Meyer v. Sulzbacher*, 76 Ala. 121; *Crawford v. Kirksey*, 55 Ala. 295. This is no new doctrine, as shown by the numerous cases cited in these decisions, through the principle could not often be invoked while a uniform system of bankruptcy was in operation. See, also, *Covanhovan v. Hart*, 21 Penn. St. 495; *Clements v. Moore*, 6 Wall. 312; *Estwick v. Cailland*, 5 T. R. 420. If there was fraud in Vogel's original purchase of the goods, and the defendants bought with knowledge of that fraud, the vendors might have disaffirmed the sale, and recovered the goods by action at law.—*Loeb Brothers v. Peters & Brother*, 63 Ala. 243; *Loeb v. Flush Brothers*, 65 Ala. 526. But the theory of such action at law is, that the vendors have never parted with the legal title to the goods, or, at least, that the legal title becomes again vested in them on their disaffirmance of the sale. In this case, the complainants sue as creditors of Vogel, and thereby affirm and ratify his purchase; and they complain of

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alleged fraud in the sale of goods purchased from other persons, not parties to these proceedings.

SOMERVILLE, J.—The main purpose of the bill is to set aside, as fraudulent, the transfer of a stock of merchandise made by one Vogel to the defendants, Bernstein and Schonfeld, and by them subsequently sold to one Spira. Two other transfers made by Vogel about the same time are also attacked; but the principle involved in each transaction being the same, we propose to confine our discussion chiefly to the first mentioned.

The theory of the bill is, that Vogel, being insolvent, purchased a considerable portion of this stock of merchandise from the complainants, under the false pretense of being solvent, which conferred on the complainants the right to rescind the sale; that Vogel sold the property to the defendants Bernstein and Schonfeld, and they to Spira, for the purpose of fraudulently depriving them of this right; and that all of the defendants bought with notice of the alleged fraud, and were, therefore, participants in it. This state of facts, it is argued, vitiates the entire transaction, as a transfer made by Vogel with the intent to hinder, delay, or defraud the complainants, and other creditors, of their lawful rights in the premises.

We propose to consider the case upon the assumption, urged by appellants' counsel, that this phase of it is fully supported by the testimony, and that each of the defendants purchased the property with a knowledge of facts sufficient to put them on inquiry as to the supposed fraud, and that they were all chargeable with notice of it.

The bill seeks to set aside this sale of the merchandise and other property, and to condemn the property to the satisfaction of the debts due to complainants from Vogel's estate, he being since deceased.

It is our opinion that the bill is clearly without equity.

The principle may now be regarded as settled law in this State, that when an insolvent debtor makes a sale of his property in absolute payment of an honest debt, and at a fair and adequate price, without reserving any benefit whatever to himself, the sale will be sustained by the courts as a valid exercise of the debtor's right of preference, although he may have made the sale with a fraudulent intent, of which the purchaser was cognizant.—*Meyer v. Sulzbacker*, 76 Ala. 121; *Hodges v. Coleman*, *Ib.* 103, 120. The act itself being authorized by law, the fraudulent intent does not vitiate it.

An examination of the testimony in this case, with a proper consideration of the oral and printed arguments of counsel, satisfies us that Sigmund Vogel, at the time of the transfer in

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question in December, 1883, was justly indebted to the defendant Bernstein in the sum of about ten thousand dollars, due for moneys paid out and lawfully assumed to be paid at the debtor's request; and that he owed the defendant Mrs. Schonfeld not less than seventeen thousand dollars for moneys loaned by her to Vogel, and for debts of his assumed at his request, and for the payment of which she was liable. The two sums thus aggregate about twenty-seven thousand dollars. The evidence is, moreover, satisfactory in support of the further fact, that the entire property sold by Vogel to these two creditors, including the land conveyed to Mrs. Schonfeld, was not worth so much as the price paid, and no benefit was reserved to the vendor in making the sale.

It is insisted, however, that the case made by the bill does not fall within the influence of the foregoing general rule. The argument, as we have said, is, that the complainants had an option to rescind the sale made by them to Vogel, of a portion of this stock of merchandise, on account of his fraud in the purchase, and that he and the defendants colluded together to deprive complainants of the right to exercise such option by the transaction of sale and purchase here attacked. The vice of the argument seems, among other things, to lie in the assumption, that a transaction which is lawful when consummated, may be rendered unlawful retrospectively by a mere potentiality, the future happening of which depends upon the exercise of a discretion by a third person, whose rights are incidentally involved. The purchases made by Vogel from the complainants and others of his creditors were in no sense void. They were only voidable at the option of the several vendors, seasonably and severally expressed. The legal title and the property in the goods were vested in Vogel as purchaser, with the legal right to transfer a perfect title to any vendee purchasing for value, and without notice of the original vendor's right of rescission or disaffirmance.—*Hornthall v. Spira*, 77 Ala. 137. Unless this right or option should be exercised, Vogel's right to sell was as perfect as if he had paid the cash for the property, and owed nothing on it. A failure or refusal to disaffirm was precisely tantamount to an election to affirm, and the exercise of the latter option would cure every possible defect in title. The right of disaffirmance, in other words, was a dormant right, and could only be quickened into life by being brought into exercise; and if never thus quickened into life, it was as if it had never legally existed.

The rights of the complainants, as to any property sold by them to Vogel, could be asserted at law, if they existed at all. Their remedy was adequate, upon the supposed facts,



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either by a recovery in detinue or trover, upon a disaffirmance of the sale, or possibly by an action on the case. This is upon the hypothesis, that the purchasers had notice of the complainants' rights. If they did not, the complainants' right to disaffirm was extinguished, and they had no remedy at all. Nor would it seem reasonable, or conscionable, that complainants should derive any benefit from the facts that other creditors of Vogel than themselves had been deprived of their option to rescind sales made to him by them, especially when the vendors themselves make no complaint of the fact, and it does not appear that they elected to exercise such option. The complainants are in no wise injured by this. Even were it a legal fraud, it would confer on them no right of action, for it works them no damage.

There is yet another objection to the equity of the bill. The bill denies Vogel's right to the property in question, by reason of his alleged fraud in the purchase of it. It seeks at the same time to condemn the property as Vogel's. Nor do the complainants seek to disaffirm the sale made by them to him. If they had done so, they would, by this very act of rescission, have elected to cancel the sale, and, by reclaiming their goods, would *ipso facto* have ceased to be creditors. They, therefore, by their bill necessarily affirm such sale, and thus waive their option. They can not do this, and claim to be defrauded, because the very idea of the fraud complained of consists in the continued existence of the right to exercise their option.

These facts, in our opinion, involve no such fraud as would authorize a court of chancery to intervene for the purpose of setting aside the sales which are attacked in this proceeding.

We discover no error in the decree of the chancellor, and it is accordingly affirmed.

## Hines v. Duncan.

*Bill in Equity by Creditor, to subject Equitable Estate of Married Woman.*

1. *Homestead exemption; against what process available.*—The statute which declares that a homestead, of specified value and quantity, "shall be exempt from levy and sale under execution, or other process for the collection of debts" (Code, § 2820), applies not only to formal and technical process, but to any judicial proceeding, at law or in

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equity, which seeks the appropriation of the property to the payment of debts.

2. *Same; occupancy.*—When the character of a homestead has been impressed upon a house and lot by actual occupancy, it is not lost by a leasing for twelve months or less (Code, § 2843); but the right of exemption does not attach without actual occupancy, and is lost by failure to resume possession, in case of lease, at or before the expiration of twelve months.

3. *Same; as against bill in equity by creditor seeking to subject equitable estate of married woman.*—A bill in equity by a creditor of a married woman, seeking to subject her equitable estate to the payment of a debt created by contract, creates a lien on the property from the service of process; against which lien a claim of homestead exemption can not prevail, unless the right of exemption existed when the bill was filed.

### APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 20th March, 1885, by Edward F. Hines, as the administrator of the estate of Charlotte Hines, deceased, against Mrs. Bridget Duncan and her husband; and sought to subject a certain house and lot in Mobile, which was alleged to be held by Mrs. Duncan as an equitable estate, to the payment of a note for \$200, which was dated February 27th, 1883, payable two years after date, and given by Mrs. Duncan for money borrowed from Mrs. Hines. The house and lot, which was particularly described in the bill, was held by Mrs. Duncan under a deed of conveyance dated March 11th, 1872, which conveyed the property to "her sole and separate use, benefit and behoof;" and a copy of this deed was made an exhibit to the bill. Mrs. Duncan answered the bill, and therein pleaded that the house and lot was occupied and claimed by her as her exempt homestead under the constitution and laws of the State, and that her claim of exemption had been duly filed with the judge of probate on the 14th April, 1885. The complainant thereupon filed an affidavit, contesting the asserted claim of exemption. By written agreement, signed by the counsel of the respective parties and entered of record, it was admitted "that Mrs. Duncan is at this time residing on said property, claiming it as her homestead, but neither she nor her husband was there residing when the original bill in this cause was filed, nor when the summons was served on her, nor for one year previous thereto; that she moved into said house after she was thus sued, and selected and claimed it as her homestead, some days after said bill was filed and summons served, and before filing her answer to the bill." The chancellor held, that the claim of homestead exemption must prevail against the lien acquired by the filing of the bill and service of process in this case, and therefore dismissed the bill, on final hearing on pleadings and proof; and his decree is now assigned as error.

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G. L. SMITH, for appellant.—By the filing of his bill, and the service of process under it, the complainant acquired a specific lien on the property sought to be charged; and this lien must prevail against all persons coming in afterwards by purchase or otherwise, or acquiring rights not then in existence. *Turner v. Kelly*, 70 Ala. 95; *Kelly v. Turner*, 74 Ala. 523. Occupancy is an essential ingredient of the right to a homestead exemption, and this must exist at the time the process is served, else it can not override the lien thereby acquired. *Scaife v. Argall*, 74 Ala. 473; *Murphy v. Hunt*, *Miller & Co.*, 75 Ala. 439. In one sense, the lien acquired by the service of process is inchoate and conditional—that is, it is conditional on the rendition of a final decree in favor of the complainant; but the decree relates back to the service of process, and the lien is effective from that day. It is like the lien of an attachment, which relates back to the levy, and can not be defeated by a claim of homestead under an occupancy subsequent to the levy.—Thompson on Homestead Exemptions, § 318. To refuse the complainant a decree because of the interposition of a claim of homestead, and then allow the claim of homestead because he has no decree, is but reasoning in a circle.

CLOUD & CLOUD, and L. H. FAITH, *contra*.—The filing of the bill, and the service of process under it, created an inchoate lien, which did not ripen into a perfect lien, except as against other creditors, until the rendition of a final decree. The specific lien becomes fixed and operative only from a rendition of a decree.—74 Ala. 513; 70 Ala. 85; 5 C. E. Green, N. J. 109; 7 *Ib.* 127. The debtor may make a selection and claim of homestead, although suit may be pending against him, at any time before a specific lien is fastened on the property.—*Bender v. Meyer & Co.*, 55 Ala. 576; *Schuessler v. Wilson*, 56 Ala. 516; *Weiner v. Sterling*, 61 Ala. 98; *Sherry v. Brown*, 66 Ala. 51; *Zelnicker v. Brigham & Co.*, 74 Ala. 598. A bill in equity against a married woman is the only remedy given by law to charge her equitable estate, and it confers no greater rights on the creditor, except as against other creditors, than the institution of an action at law against an ordinary debtor.

CLOPTON, J.—Statutes conferring on a debtor the right to exemption of property from sale for the payment of debts have been generally regarded as founded in a humane and enlightened policy, having respect to the common welfare, as well as to the benefit of the individual debtor. Their obvious purpose is to secure to each family a home and means of livelihood,



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irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pauperism, and of the individual citizen from destitution. Such statutes are entitled to a liberal construction—a construction in conformity with the benevolent spirit which moved their enactment. Whilst the language of the statute is, “*shall be exempted from levy and sale under execution, or other process for the collection of debts,*” a formal, technical process is not requisite. The exemption is, in spirit and substantially, from the payment of debts; and the property is exempt from sale by either process at law or in equity, the subject of which is its appropriation to the payment of debts. The homestead of a married woman, being her equitable separate estate, is exempt from condemnation, by decree in equity, to pay her debts, if the claim is interposed in proper time and mode.—*Weiner v. Sterling*, 61 Ala. 98. Notwithstanding such statutes are entitled to a liberal construction, it should not be so liberal as to depart from the plain and obvious meaning of the words used, or to dispense with the necessity of parties bringing themselves within their provisions, without being supplemented or extended by judicial construction.

By statute, any lot in a city, town or village, not exceeding two thousand dollars in value, with the dwelling and appurtenances thereon, owned and occupied by any resident of this State, or, if the same can not be allotted, then two thousand dollars of the value thereof, is exempt from the payment of debts contracted after April 23d, 1873. If the claim of the exemption of the homestead is not asserted before a sale thereof, it is considered as waived; but, by our uniform decisions, it may be successfully interposed at any time before a sale, or an order of sale.—*Simpson v. Simpson*, 30 Ala. 225; *Sherry v. Brown*, 66 Ala. 51. If there existed the right to a homestead exemption as against the demand of appellant, it was claimed in due time.

The bill is brought by appellant to subject a lot of land, situate in the port of Mobile, which is the equitable separate estate of Mrs. Duncan, to the payment of a note made by her, February 27th, 1883, to appellant's intestate. At the time of the filing of the original bill, and of the service of process, neither Mrs. Duncan nor her husband was in the actual occupancy of the lot, and had not been for twelve months previously; but, some days after the service of process, they moved into the dwelling-house thereon, occupied, selected, and claimed the land as a homestead, and as exempt from the payment of the note. The right to a homestead exemption is dependent and determinant on the state of facts as they existed at the time the lien of the process attached; and if the right does

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not exist at this time, it can not be created by any subsequent act of the debtor. To be available, there must be a present right of exemption, when the creditor acquires a lien; otherwise it is subordinate thereto—*Scaife v. Argall*, 74 Ala. 473; *Murphy v. Hunt, Miller & Co.*, 75 Ala. 438. The land, unless impressed with the distinctive quality and character of a homestead, is not exempt. Owned and occupied, or, what is the equivalent of occupancy in the meaning of the statute, a present and actual purpose to use and occupy, are essential conditions. When there has been actual occupancy as a dwelling-place, so as to secure the right of exemption, the statute provides: "A temporary quitting, or leasing the same, for a period of not more than twelve months at any one time, shall not be deemed to be an abandonment of it as a homestead." A prior use and enjoyment as a home is requisite to the statutory privilege of temporarily quitting or leasing; and if the owner does not actually occupy the premises, until a lapse of more than twelve months of continuous time, the right of exemption is lost. To sustain a claim of homestead exemption, there must be averment and proof of occupancy.—*Lyne v. Wann*, 72 Ala. 43; *Waugh v. Montgomery*, 67 Ala. 573; *Blum v. Carter*, 63 Ala. 235; Code, §§ 2820, 2843.

There is neither averment nor proof of occupancy before or at the time of the service of process. The availability of the claim of exemption must, therefore, depend on the determination of the question, whether a creditor, by filing a bill to condemn the equitable separate estate of a married woman to the satisfaction of her contracts, and service of process thereon, acquires a lien on the property specifically mentioned, effectual to prevent the accrual of a right of exemption by subsequent occupancy before a decree of condemnation and sale.

It may be regarded as settled in this State, whatever may be the rule in other States, that a bill in equity, with service of process, by a creditor to set aside a fraudulent deed, and have the land of his debtor sold, gives the complainant a lien on the land, which will not be defeated by a *bona fide* sale by the defendant, or under an execution on the judgment of another creditor, which did not have a prior lien. It was so held in *Dargan v. Waring*, 11 Ala. 988; and there has been no subsequent departure from the rule. On the contrary, it has been re-affirmed.—*Evans v. Welch*, 63 Ala. 250. It has been held, that a fraudulent conveyance of the homestead will not deprive the debtor of the right of exemption, though set aside at the instance of creditors; for the reason, that as the creditor had no right to condemn the homestead to the payment of his debt, he is not injured, and has no cause to complain. In such case, the right of homestead exemption had existed before the

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filing of the bill, and the debtor had the right to sell and convey without abandoning it. If such be the effect of a suit in equity to set aside a fraudulent conveyance, more cogent reasons exist in favor of the acquisition of a lien by a creditor, who files a bill to subject the equitable separate of a married woman.

At law, the contracts of a married woman are void. She is without capacity to contract a debt, binding on her personally. Having a separate estate, with the power of disposition, which is the creature of equity, her engagements attach a liability to her estate, and not to her personally; and "as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied." The remedy rests on the jurisdiction of the court to reach and subject assets purely equitable,—“a special equitable remedy arising out of a special equitable right.” In a bill brought for such purpose, the particular property sought to be subjected must be specifically described. The remedy is also specific, as the court deals only with the property thus mentioned, and its liability. To this extent the proceeding is *in rem*, though in form, and other respects, it is a proceeding *in personam*. In *Kelly v. Turner*, 74 Ala. 513, speaking of the operation of the decree on a bill by a creditor resorting to a court of equity to subject the equitable separate estate of a married woman, and the consequent necessity of specifically describing the property, on which the decree is to operate, it is said: “In this respect, the suit has some of the characteristics of a proceeding *in rem*, though, in form and essential elements, it is a suit *inter partes*. A *lis pendens* is created by the institution of the suit, operative against all persons coming in subsequently, by purchase or otherwise. It creates a specific lien, if successfully prosecuted to final decree; the decree taking effect, by relation, from the day of the service of summons to answer.” Lien, in its enlarged signification, denotes the various charges of debts upon land or personalty, whether created by contract or by statute, or recognized in equity. “In courts of equity, the term *lien* is used to denote a charge or incumbrance on a thing, when there is neither *jus in re*, nor *jus ad rem*, nor possession of the thing.”—*Donald v. Hewitt*, 33 Ala. 534. We do not mean to assert, that the mere contract of a married woman creates a lien or distinct charge upon her separate property. But it may be asserted as a general proposition, settled by our former decisions, that a bill in equity, brought to subject her separate property to the satisfaction of her contracts, followed by service of process, creates a lien upon the specific property sought



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to be subjected. Such bill, and service of process thereon, are in the nature of an equitable levy, and give the court control of the property, which it will not permit to be withdrawn by any subsequent act or title, so as to render the suit ineffectual. In the absence of such bill, she may dispose of her property, and a purchaser would acquire title, though he had notice of her debts; but, after such suit is instituted, she is not authorized to make a disposition of it by sale or otherwise, or to materially change its *status*. The lien thereby acquired may be defeated or lost by a failure to prosecute the suit to a final decree of condemnation and sale; but it becomes specific, when the suit is prosecuted to a final decree.—*Miller v. Sherry*, 2 Wall. 237.

It may be said, that the lien, being inchoate, will not prevail over a right of homestead exemption acquired by subsequent occupancy, and before the lien is consummated and made specific by a final decree in the suit. The lien acquired by the levy of a writ of attachment is only inchoate, dependent upon the rendition of judgment. If no judgment is rendered, the lien is lost; but, if judgment is obtained, it overrides and defeats any conveyance of the property, subsequent to the levy, and prior to the judgment.—*Reed v. Perkins*, 14 Ala. 231. If the right of a homestead exemption does not exist at the time of the levy of the attachment, its lien can not be defeated by an occupancy subsequent to its levy.—*Kelly v. Dill*, 23 Minn. 435; *Bullem v. Hiatt*, 12 Kan. 98. The land in controversy, being charged with the payment of the note of Mrs. Duncan, when the appellant filed the bill and had process served, he acquired a specific right to have it sold for this purpose—to have such charge made effectual. When a final decree is made, it relates to, and takes effect from the date of the service of process. By the final decree, the lien is made specific from this date, and overrides and defeats all intervening rights and titles. By no subsequent act of the debtor can the lien be defeated. Permitting the subsequent occupancy of the land as a homestead to prevail over such lien, will constitute the statute an instrument of fraud, instead of a shield of protection. In this respect, the lien thus acquired does not differ from a lien secured by the levy of an execution, or of an attachment. It certainly was not the intention of the statutes to confer on the debtor power, by his own act, to deprive a creditor of rights previously acquired. Mrs. Duncan is not entitled to homestead exemption, superior to the previously acquired lien of complainant. She does not bring herself within the provisions of the statutes as heretofore construed.

Reversed and remanded.

## Williams, Deacon & Co. v. Jones.

*Bill in Equity by Assignee of Insolvent Bank, asking Instructions; Cross-Bill by Creditors claiming Preference.*

1. *Amended answer and cross-bill; repugnancy with original.*—An amended answer and cross-bill, when inconsistent with and repugnant to the original, is demurrable; as where the original repudiates a payment, alleged to have been wrongfully made, and the amendment seeks to ratify and claim the benefit of it.

2. *Remedies of holder, against prior parties to bill of exchange.*—The holder of a bill of exchange may maintain, at the same time, separate actions against the acceptor, the drawer and the payee, their liability being fixed by proper protest and notice, and nothing but a payment of the judgment against one will discharge the others; and where the bill is held as collateral security for prior advances made to the payee, he may maintain an action against the acceptor in the name of the payee.

3. *Election of remedies in case of wrongful payment.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety; and he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment. But, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor; and the holder of a bill of exchange, to whom it has been transferred as collateral security by the payee, does not forfeit his right of action against the other parties, by an unsuccessful suit against one.

4. *Dismissal of bill without prejudice.*—When a bill asserts inconsistent and repugnant rights, and is dismissed on that account, the dismissal is properly made without prejudice.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The original bill in this case was filed on the 29th August, 1884, by Winston Jones, as assignee, or trustee, in a deed of assignment executed by the Bank of Mobile for the benefit of its creditors, against the said corporation and its creditors; asking that the court would take jurisdiction of the trust, instruct the complainant in the discharge of his duties, require all the creditors to come in and propound their claims, settle all conflicting claims and equities, and administer the assets as required by law and the rules of equity. The deed of assignment, which was executed on the 8th July, 1884, conveyed all the assets and property of the bank, including two large tracts of land, one situated near the city of Mobile, and the other in Mississippi, on each of which a valuable saw-mill, with appurtenances, was situated; and also a large quantity of logs and

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lumber, of the estimated value of \$80,000. The bill alleged that this property was taken by the bank from the Danner Land and Lumber Company, a private corporation, of which A. C. Danner was the president and principal stockholder, "at an aggregate value of \$162,000, in settlement of a debt due from said company to said bank for certain discounts and overdrafts, and also in settlement of certain sterling exchange drawn by said company, at Mobile, on George Shadboldt & Son, London, England, to an amount exceeding \$100,000; and which exchange had been bought by said bank, and had been accepted, as your orator is informed and believes, and so avers, by said Shadboldt & Son, but which acceptances, at the time of said settlement, your orator charges, on information and belief, said Shadboldt & Son were unable to meet." The bill alleged, also, that Williams, Deacon & Co., bankers in London, who were made defendants to the bill, asserted a claim to this property, and a prior lien upon it, as the holders of said accepted foreign bills; but denied this claim and lien, on information and belief.

An answer and cross-bill was filed by Williams, Deacon & Co., to which the chancellor sustained a demurrer; and his decree was affirmed by this court, on appeal, at the last term.

*Williams, Deacon & Co. v. Jones*, 77 Ala. 294. Afterwards, they filed an amended answer and cross-bill, to which the chancellor again sustained a demurrer, but on the ground of its inconsistency and repugnancy with the original; and from this decree they sue out the present appeal. The changes made by the amendments, as set out in the transcript, can only be understood by placing them in juxtaposition with the original answer and cross-bill. The following are the material parts of each, or the substance thereof:

1. Respondents have been carrying on a banking business in London for many years, "and have had dealings with said Bank of Mobile for over forty-five years; but said dealings were thought by them to be secured by the bank remitting to them collaterals to cover their drafts, as hereinafter stated; besides, they had confidence in the integrity of the bank officials, and in the solvency of the corporation." *Amendment*: "Add at the end of first paragraph, *But they relied, in their business dealings with said bank, on the collaterals they held, as hereinafter stated.*"

2. The Danner Land and Lumber Company, a private corporation under the laws of Alabama, was largely engaged in the manufacture and shipment of lumber and sawn timber for English and European markets; and drew sundry bills of exchange on George Shadboldt & Son, wood-brokers, residing and doing business in London, to whom it also shipped cargoes



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of lumber and timber. "Said bills were drawn at sixty days after sight, and were duly accepted by said Shadboldt & Son on presentation. At the time said bills were drawn, said Danner was also president of said Bank of Mobile, and was actively engaged in the management of the affairs of said bank, as well as of said company. J. C. Strong, the secretary and treasurer of said company, drew said bills, by the instructions of said Danner, in large amounts, and at short intervals. These bills were lodged in the Bank of Mobile by said Danner, president of said company, and were ordered to be discounted by him as president of said bank, and the proceeds to be placed to the credit of said company; and said Danner, as president of said bank, ordered and directed said bills to be remitted to Williams, Deacon & Co., to be collected at maturity, and at the same time, as president of said bank, ordered and directed that bills of exchange be drawn by said bank, generally at sixty days, and sometimes at sight, on Williams, Deacon & Co., to cover amount of said bills; and further ordered that, whenever, by the regular course of the business of the bank, foreign exchange was not sold in sufficient amount to cover these bills, that said bank should then draw exchange in its own favor on these respondents, and send the same to its correspondent bank in New York, in sufficient amounts to cover any balance on said bills which might at maturity come into the hands of Williams, Deacon & Co., on payment of said bills. This was done, and all such exchange was paid by these respondents; and large sums of money were thus drawn from respondents, and deposited in New York, on which said bank drew its domestic exchange."

3. If this course of dealing was not expressly ordered by said Danner in his official capacity, it was done by his subordinate officials, with his knowledge and consent, and was ratified by him; and said lumber company "got the full benefit thereof, and these respondents paid all of said drafts of the bank, to the full amount of said foreign bills which they were drawn to cover."

4. "In furtherance of this scheme, as president of both corporations, to obtain money from these respondents to keep up said lumber company, and to keep said bank in funds, said Danner caused said bills to be drawn at sixty days after sight, and procured their acceptance by said Shadboldt & Son, to whom said company consigned its lumber and timber sent to England for sale."

5. Said bills, now unpaid, a list of which is given, amount in United States currency to \$110,226.23, besides interest, which were thus discounted by said bank, and sent to these respondents, "who are *bona fide* holders thereof for value paid and advanced to said bank before the maturity of said bills."

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"6. Respondents further show that, after said bills had been thus drawn, discounted and accepted, and after they became such holders for value, and after the bank had drawn on these respondents for the full amount thereof, and they had paid the same, said Shadboldt & Son announced their determination about the 9th July, 1884, not to pay the same to respondents, stating that they had received instructions from said lumber company and said bank not to pay the same; alleging as a cause that, by reason of some transaction between said lumber company, the drawer, and said bank, the indorser, said bank had assumed to pay these bills, and had released said drawer and acceptors from liability thereon. These respondents at once denied the right of said bank and said lumber company to make any contract whereby the rights of respondents, who were then and now the *bona fide* holders for value of all said bills, could be affected or impaired, without their consent. Said bills were, at that time, all in the hands of respondents, and held by them against exchange drawn by said bank and paid by respondents. Neither said bank nor said lumber company ever demanded said bills of these respondents, and never undertook to control them, or to claim the right to control them. As said bills matured, they were, each and all, duly protested for non-payment, in accordance with the laws of England, where said bills were payable; of which protest said bank and said lumber company had due notice; and all the parties were promptly advised that respondents would look to each of them for payment."

*Amendment:* Strike out this paragraph, and insert in lieu thereof: "Respondents further show that, after said bills of exchange had been thus drawn and discounted in said Bank of Mobile, and accepted by Shadboldt & Son, and after said bank had drawn its exchange for the full amount thereof on these respondents, and they had accepted the same, and said bills, so accepted, were in the hands of third parties, said Shadboldt & Son announced their determination about the 9th July, 1884, not to pay the said bills which they had accepted; alleging, as a reason, that the said bank had accepted payment in property for said bills from said Danner Land and Lumber Company, and had assumed to pay these bills to these respondents, and had released the said drawer and acceptors therefrom. All of said bills were, at said time, in the hands of these respondents, having been sent to them by the Bank of Mobile as collateral security to said bills of exchange drawn by said bank, in about a corresponding amount, with said Shadboldt & Son's acceptances. Respondents did not, for some time thereafter, become informed of the character of said transactions; and hence, as each bill matured, they were duly pro-

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tested, of which said bank and said drawer had notice. Said bank and said lumber company had full knowledge that respondents held said acceptances as collateral to said bills of exchange."

7. The transactions between the bank and the lumber company, which resulted in the execution of the assignment to Jones as trustee, were stated in this paragraph, on information and belief; and it was alleged that the property was taken by the bank as payment of the sum of \$162,000. *Amendment:* "Add, at end of said paragraph, these words: But, after said assignment, said Jones, the assignee, denied the right of these respondents to any share in said property so conveyed, or the proceeds thereof; and respondents were not informed of all the facts in reference to said sale, until long after their answer and cross-bill was filed in this court."

"8. Said bank took said property in payment of the liability of the Danner Land and Lumber Company to it, the bank being ultimately liable to pay said foreign bills, having passed them to respondents prior thereto, and drawn the full amount thereof in advance of their maturity. As soon as said sale and conveyance were made, said Danner, as president of said two corporations, notified said Shadboldt & Son, the acceptors, not to pay any of said bills at maturity, asserting that the drawer had paid here; he well knowing, as president of said bank and said lumber company, that these respondents held said bills, and that said bank had drawn its exchange to the full amount of the proceeds thereof, and that respondents had paid the same, and that said bank had the money in its coffers, or under its control, and that respondents were the *bona fide* holders for value of all said bills; and that the indorsement thereon by said Manly, cashier, was only the form he had put thereon to identify the sender on the face of the bill, which was done with the knowledge and direction of said Danner; and that said form only meant that, if said bills were paid, said bank would be entitled to a credit therefor on its exchange account with these respondents; and that these bills were remitted to these respondents for the purpose of being held by them as their property, and, if collected, the proceeds to be credited on said exchange account. Accompanying each of said bills, as the same was remitted by first mail after discount thereof by the bank, the said bank, by R. F. Manly, its cashier, inclosed the same in its letter of advice, informing these respondents that each of said bills was remitted for its credit. Respondents agreed to receive them for its credit, and so entered them on their books, and have ever since held them as their property; and such was the course of dealing between said bank and respondents."



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*Amendment:* "Strike out the 8th paragraph, and insert in lieu thereof the following: 8. Said bank took said property in absolute payment of the liability of said Danner Land and Lumber Company to it, growing out of said drafts drawn by it and so discounted, and in part for other claims; but said drafts amounted to fully two-thirds of the indebtedness extinguished by said sale of property to said bank by said company, and said bank agreed to protect said drawer and acceptors against any liability which might exist in favor of these respondents as the holders of said bills, and to pay the same in consideration of said sale; all of said parties well knowing that these respondents were the *bona fide* holders for value of said drafts, and that they were held as collateral to said bills of exchange, so drawn by said bank and by them accepted, and then in the hands of third parties, to whom the bank had sold them, and received the money thereon. As each of said acceptances of Shadholdt & Son was discounted in the Bank of Mobile, they were sent by first mail to these respondents, in a letter written and signed by R. F. Manly, cashier of said bank, in which he informed them that each of said bills was remitted for the credit of said bank. On receiving each of said bills, complainant (?) agreed to receive them for the credit of the bank, and as collateral security to said bills of exchange drawn by the bank, which they had accepted, and were duly paid by respondents at maturity."

9. "Said bank thus received from the drawers of said bills payment of the same in property, after the assignment of said bills to these respondents, and contracted for said consideration to release said drawer and acceptor from liability thereon, after said bank had assigned said bills to these respondents, and had received from them full value therefor, as above set forth. Said bank thereby made itself the trustee of these respondents in reference to said property, and liable to account to them for the full value thereof, or for so much as the said bills bear to the whole amount of the debt thereby paid; and said Jones, said assignee, was then and there a director of said bank, and was one of the persons appointed by it to negotiate and receive said property for it, and was active in said transaction, and participated in the same in all its details, and had full knowledge of the whole transaction, and took said property by said transaction charged with said trust."

*Amendment:* "After the word 'drawer,' in third line of 9th paragraph, insert 'and acceptors;' and after the word 'thereof,' in fourth line, 'as above set forth;' and after the word 'thereof,' in the sixth line, 'or for so much as the said bills bear to the whole amount of the debt paid thereby.'"

10. "Respondents further show that said" lands, mills,  
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lumber, etc., "was the exclusive property of said Danner Land and Lumber Company, and was conveyed by it for the express and only purpose of paying its liability to said bank, as evidenced by these foreign bills; that all the balance of the liabilities of said company were in the shape of discounts and overdrafts held and owned by the bank, which were surrendered at the time of the delivery of this property; but these foreign bills not being held or owned by said bank, which said Danner well knew, said bank never undertook to surrender or deliver the same, and was powerless to do so, if it had, save by paying to respondents the amount thereof. Respondents make an exhibit showing the full amount of the indebtedness of said bank to them, with credits to which it is entitled," etc.

*Amendment:* "Strike out, in the 10th paragraph, all after the word '*bills*' in the fourth line, and insert in lieu thereof the following: And some other discounts and overdrafts, amounting to about \$50,000; that said bank, on receiving said property, released the said drawer and acceptors, and had such release entered on its books; that said property was taken in payment of \$162,000 of indebtedness, of which sum these acceptances of Shadboldt & Son held by respondents were over one hundred thousand dollars, and which acceptances said bank, for said consideration, agreed to pay. Respondents show, also, that said bills of exchange so drawn by said bank, and accepted and paid by these respondents, were in about corresponding amounts to said Shadboldt & Son acceptances, and drawn immediately after the discount of each of said Shadboldt & Son drafts; and each of said bills was accepted and paid by these respondents on the faith and security of holding said Shadboldt & Son acceptances as collateral thereto; that said bank had no credit with respondents for such a large sum of money; that for many years they had required said bank to furnish collateral for the protection of respondents in honoring its foreign exchange; that said bank had deposited with them, since September 22, 1881, \$60,000 of Alabama bonds, class A, under an agreement for this purpose, which was required in their dealings long before they commenced receiving said acceptances of Shadboldt & Son, and which bonds were held by them at the time of the failure of the bank, and which respondents deemed sufficient for their protection in paying such foreign bills as the bank had been, for many years, in the habit of drawing; and they were, besides, otherwise kept in funds by said bank, whenever drafts exceeded the value of said collaterals. Respondents were informed and believed that the Danner Land and Lumber Company, the drawer of said bills, was a solvent and pecuniarily strong corporation, and that all

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the said bills drawn by them and discounted in said bank were drawn against actual shipments of lumber and timber by said corporation to Shadboldt & Son, their wood-brokers in London; and they regarded said acceptances as solvent credits in their hands, and accepted the said bills drawn on them by said bank on the faith and security that said acceptances would be promptly paid at maturity, and thereby reimburse them for said advances. The limits of the credit said bank had with these respondents was about covered by the collaterals of Alabama bonds, and the excess they believed to be secured by the Shadboldt & Son acceptances. At the time of the failure of said bank, it had drawn its exchange on respondents, which they had accepted, to an amount of, say \$158,492; of which sum, all in excess of the value of said bonds, say \$110,000, was accepted on the faith and security of the Shadboldt & Son acceptances, which they held as collateral to indemnify them against said money so advanced to said bank. Besides these fifteen bills, others had been previously remitted, matured and paid, and other exchange had been drawn against prior bills, and had been accepted, matured and paid; and at the failure of said bank, the state of accounts of said dealings was as herein stated. A copy of the letter of W. H. Pratt, then the president of said bank, remitting said bonds, is hereunto attached as an exhibit, and made a part of this amended bill.'"

11. "Thus matters stood between these respondents, the Bank of Mobile, and the Danner Land and Lumber Company, when the depositors became alarmed for the safety of their deposits," &c., which resulted in a *run* on said bank on the 8th July, 1884; by reason whereof, the bank suspended payment on that day, and executed said assignment to Jones as trustee. "Said deed conveyed all the assets of said bank, and all its property, rights and interest, including the property conveyed by said company to said bank to pay said foreign bills, as above set forth. In pursuance of said assignment, which was duly accepted by said Jones, he took possession of said property, and has ever since exercised dominion and control over the same. Respondents insist that said property, or its proceeds, should be applied to the payment of said debt of these *respondents* against said Danner Land and Lumber Company and said Bank of Mobile, both of which are indebted to them in said large sums of money, one as the drawer, and the other as the indorser of said bills of exchange, each having due and legal notice of the protest of said bills, and being otherwise liable therefor; because said company indemnified said bank by said conveyance of said property, and said company, in addition to said notice of protest, waived notice thereof, by notifying the acceptors not to pay the same to these respondents, at maturity



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of said bills. Said facts, which respondents are ready to verify, give them a prior equity over other creditors of said bank on the said property for the satisfaction of their said claim, because said company was the common debtor of your respondents and said bank at the time said sales were made, and said property was conveyed to said bank for the purpose of paying the debt of said company."

*Amendment:* "Strike out of the 11th paragraph all after the word '*respondents*' in the 14th line, and add in lieu thereof, '*Or so much thereof as said acceptances bear to the value of the whole property as taken in payment of said indebtedness of said Danner Land and Lumber Company by said Bank of Mobile.*'"

12. "Respondents deny that the depositors of the bank have any preference of payment, in law or fact, over them, out of the other assets of the bank so alleged in said bill; and they claim that said assignee, by virtue of his authority under said deed of assignment, should pay them on their said claim the same percentage as depositors and noteholders, after first selling said real property, logs and lumber, and applying the same to the payment of said debt. Respondents allege that said property was taken by said bank at an excessive valuation, and when said assignee comes to realize on the same, that it will fall far short of paying respondents' said debt. They have brought suit in the Queen's Bench in London, England, against said Shadboldt & Son as the acceptors of said bills, and against the Danner Land and Lumber Company, as drawers of said bills, in the Circuit Court of the United States for the Southern District of Alabama; which said suits at law are now pending, and when said trustee sells said property, and applies the proceeds thereof to the payment of said bills, said drawer and acceptors will then be entitled to a credit to the extent of the payment so made on their aforesaid liabilities."

*Amendment:* "Strike out the 12th paragraph, and insert in lieu thereof the following: '12. The said bank having received said property in satisfaction of the liability of said drawer and acceptors, while these respondents held said bills, they hereby ratify said purchase of said property by said bank, and claim that said assignee (Jones) should account to them for said property or its proceeds, and that he be held and treated as their trustee in reference to said property or the proceeds; and they renounce and relinquish all claim against said drawers or acceptors on said bills, and claim the right to recover said property, or its proceeds, in the hands of said Jones as assignee, and claim that, as to said drawers and acceptors, their liability on said acceptances stands paid and extinguished by the said sales of the property aforesaid; and they hereby offer to sur-

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render said bills to said assignee (Jones), on paying to complainants (?) their proportionate share of said property or its proceeds.’”

The 13th and 14th paragraphs recapitulated the material statements of the bill and answer, and contained the additional averment that the Bank of Mobile, the Danner Land and Lumber Company, and Shadboldt & Son were insolvent; and the prayer of the cross-bill was thus expressed in the 15th paragraph: “Respondents therefore pray, as complainants in this cross-bill, that said Jones be held and treated as trustee for them, as to all of said property so conveyed to said bank by the Danner Land and Lumber Company; and that he be directed to sell the same, and to pay over to your orators, or to their solicitors, the proceeds thereof, or so much thereof as these bills are in proportion to the whole value of the property, or the amount realized therefrom; and that he be required to account to them for any of said property heretofore sold, or the rents, income and profits of said mills since said sales and conveyances of said property, less the necessary expenses attending the execution of the trust; and that this hon. court will decree that, if said mill properties and their respective machinery, and said logs and lumber, be insufficient to pay respondents’ said debt, then that said assignee be directed to pay them the balance thereof out of the other assets of said bank, *unless, in the meantime, said balance, if any, be paid by said drawers or acceptors of said bills*; and that it be referred to the register to take and state an account between these respondents and said bank *and said Danner Land and Lumber Company.*” *The amendment to the prayer struck out the italicized words, as above copied.*

The chancellor sustained a demurrer to the amended cross-bill, and dismissed it, but without prejudice. The decree sustaining the demurrer, and dismissing the cross-bill, is now assigned as error by Williams, Deacon & Co.; and the dismissal without prejudice is assigned as error by Jones, the complainant in the original bill.

OVERALL & BESTOR, for Williams, Deacon & Co.—(1.) These appellants, in their original answer and cross-bill, claimed too much, as this court decided. The amendment seeks only to avoid this difficulty, and to assert the rights which, under the former decision, they were entitled to assert on the facts alleged. The institution of the action at law against the drawer and acceptors, as alleged, does not estop them from ratifying the payment, and claiming the benefit of it.—*Kinney v. Kiernan*, 49 N. Y. 168; Wharton on Agency, 76-78; Ewell’s Evans on Agency, 558; *Begman v. Bonsall*, 79 Penn.

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St. 298; *Abbott v. May*, 50 Ala. 98; *Spivey v. Morris*, 18 Ala. 254. (2.) The amendment did not make a radical departure, and ought to have been allowed.—*Cain v. Gimon*, 36 Ala. 173; *Ingram v. Foster*, 31 Ala. 128; *Blackwell v. Blackwell*, 33 Ala. 57; *Adams v. Phillips*, 75 Ala. 462; *Ward v. Patton*, 75 Ala. 207; *Mahan v. Switherman*, 71 Ala. 563. (3.) If the amendment was properly disallowed, then the dismissal without prejudice was proper.—*Durant v. Essex Company*, 7 Wallace, 109, and cases cited in note. Besides, this part of the decree is not revisable.—2 Dan. Ch. Pr. 1463.

GAYLORD B. & F. B. CLARK, Jr., and HANNIS TAYLOR, *contra*.

(1.) The amendment was properly disallowed, because it made an entirely new case, and was incompatible and repugnant to the original answer and cross-bill.—*Ward v. Patton*, 75 Ala. 207; *Rapier v. Gulf City Paper Co.*, 69 Ala. 476; *Lloyd v. Brewster*, 27 Amer. Dec. 88; *Wright v. Frank*, 61 Miss. 32; *Micou v. Ashurst*, 55 Ala. 607; *Moog v. Talcott*, 72 Ala. 210; *Lehman v. Meyer*, 67 Ala. 396; *Ray v. Womble*, 56 Ala. 32; *Pitts v. Powledge*, 56 Ala. 147; *Williams v. Barnes*, 28 Ala. 613; *Charles v. Dubose*, 29 Ala. 367. (2.) Williams, Deacon & Co. had a right of election, either to ratify or to repudiate the payment; and having made their election, with full knowledge of all the facts, it is conclusive and binding on them, and is irrevocable.—Co. Lit. 146; *Lawrence v. Insurance Company*, 11 John. 241; *Jones v. Atkinson*, 68 Ala. 167; Chitty on Contracts, 741-2; 7 Bacon's Abr. tit. *Election*; 13 Mees. & W. 834; *Lloyd v. Brewster*, 27 Amer. Dec. 88, *note*; 33 Amer. Dec. 706, *note*. (3.) The right of election being gone, the complainants must stand by their actions at law, and the bill ought to have been dismissed absolutely.

STONE, C. J.—There is such a repugnancy between the original answer and cross-bill filed by Williams, Deacon & Co., and the amended answer and cross-bill subsequently filed by them, that we think the demurrer to it was properly sustained. The chancellor's reasons for his ruling are strong and well put, and we could add nothing to them. The authorities supporting his conclusion will be found in the briefs of counsel.

The chancellor dismissed the amended cross-bill without prejudice, and this is made the subject of a cross-assignment of error. It is contended for appellee, that the pleadings show a final and conclusive election made by Williams, Deacon & Co. to repudiate the settlement the bank made with the Danner Land and Lumber Company, and that they will not now be allowed to claim that that settlement was made for their benefit. The Danner Land and Lumber Company drew the bills of exchange



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on Shadboldt & Sons, who accepted them. They were payable to the order of the Bank of Mobile, and were indorsed by it to Williams, Deacon & Co. If this indorsement had been in the usual course of business, Williams, Deacon & Co. would have become the absolute owners of the paper, with a right to proceed against any and each of the parties for its collection, provided protest and notice of it were properly carried home to the drawer and indorser. And in such case, suit might have been prosecuted against each, until satisfaction was obtained from one. Neither mere suit, in such event, could have been pleaded in bar or abatement of either of the others. Williams, Deacon & Co. claimed that the Bank of Mobile had indorsed the bills to them in the usual course of business, and their suit against Shadboldt & Sons was based on that assumption. If their right to the bills had been what they asserted it was, their suit against Shadboldt & Sons would have opposed no obstacle to contemporaneous separate suits against the drawer and indorser of the bills. The error they committed was in supposing they had acquired a right to sue Shadboldt & Sons in their own name. The legal title to the paper had not passed to them, but remained in the Bank of Mobile. They held it as collateral security—a mere equitable right to its custody and collection, until they were indemnified for the payment of the bank's exchange drawn on them. The Bank of Mobile could have maintained a suit against Shadboldt & Sons as acceptors, and it would seem the mistake made by Williams, Deacon & Co. consisted in their suing in their own names, instead of that of the bank. Holding the paper as collateral security for the bank's indebtedness to them, they could have compelled the bank to allow the use of its name for the purpose of its collection.—Jones on Pledges, § 669. And such suit against Shadboldt & Sons, even if carried into judgment, would have been no bar to a subsequent suit against the Bank of Mobile, or against the Danner Land and Lumber Company, until there was a payment of the judgment against Shadboldt & Sons. And if there had been recovery against, and payment by Shadboldt & Sons, the latter would have had a right of action against the Danner Land and Lumber Company, for whose accommodation they had accepted; and the latter's payment to the bank, after being informed the bills were the property of Williams, Deacon & Co., would have been no defense to such suit.

What we have said above is intended to show that the suit against Shadboldt & Sons is no evidence of an election to look to them alone for payment of the bills, and to absolve the other parties to the paper. It is the not infrequent case of a creditor supposing that he has several parties bound to him,

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and committing the error of proceeding against one, on whom he fails to fasten a liability. This is no defense for others who are liable. We have thus eliminated from this controversy all influence the Shadboldt suit may be supposed to have upon it.

The question in this case is thus narrowed down to the inquiry, was the institution of the present cross-suit, without prosecuting it to a decree, such an election to disaffirm the payment made by the Danner Land and Lumber Company to the Bank of Mobile, as to bar all right to abandon such suit, ratify the settlement, and claim the property received in payment? Let it be borne in mind that, unless the Shadboldt acceptances were cancelled by the settlement the bank made with the Danner Land and Lumber Company, then the debt of which they were the evidence still rests on the company, and the bank has paid no consideration for that part of the property which the company transferred for their payment—one hundred and ten thousand dollars, as it is claimed. This property the bank's assignee holds, not in his own right, nor in the right of the bank's creditors. It paid nothing for it which the creditors could claim as assets of the bank. It parted with that which, *ex æquo et bono*, belonged to Williams, Deacon & Co.; and in case of their disaffirmance, it parted with nothing.—*Williams, Deacon & Co. v. Jones*, 77 Ala. 294. If the payment be disaffirmed by Williams, Deacon & Co., then the property belongs to the Danner Land and Lumber Company, or its creditors. So, in any event, neither the bank nor its assignee has any rightful claim to the property it received from the Danner Land and Lumber Company in payment of the Shadboldt acceptances, but holds it in trust. The present cross-suit, as originally framed, did not renounce all claim to the property thus received. Its claim was, that the transaction between the Danner Land and Lumber Company and the bank was not a payment; and it is sought to disaffirm it, not *in toto*, but as payment. It claimed that the Danner Land and Lumber Company and the bank were still debtors, and that the property turned over was only an additional security for the payment of that debt. We held that these were incompatible claims, and that the demurrer to the cross-bill, as thus framed, was rightly sustained. The original answer, made a cross-bill, rested its right of recovery, in a very material point of view, on a repudiation of the payment in property made by the Danner Land and Lumber Company to the bank, as a payment binding on Williams, Deacon & Co.; but, nevertheless, claimed the property as an additional security. This we held could not be done, for reasons then stated. The amended cross-bill seeks to ratify the payment as payment, dis-

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charge the Danner Land and Lumber Company as its debtors, and to look alone to the property turned over, and its proceeds, for the payment of the claim it sets up. This we have held is incompatible with, and repugnant to the original cross-bill; and we affirm the chancellor's decree, sustaining a demurrer to it on that account. This unsuccessful attempt to claim too much is in no sense a conclusive election to repudiate the payment made by the Danner Land and Lumber Company to the bank, so as to bar all right now to claim that the payment was made for its benefit.

In *Tatum v. Walker*, 77 Ala. 563, the original bill was filed to set aside a mortgage, and have it declared inoperative and void. An amendment was filed, praying that, in the event the mortgage was not set aside, an account should be taken, and complainant be allowed to redeem. There was a demurrer, assigning as a ground that the amended bill sought inconsistent and repugnant relief; first, against the validity of the mortgage, and, second, under the mortgage, as a valid conveyance. We held that the alternate phase, brought in by amendment, was incompatible with the original bill, made a new case, and was fatal to the suit.—*Heyer v. Bromberg*, 74 Ala. 524; *Caldwell v. King*, 76 Ala. 149. We said: "If we treat the redemption aspect of the bill as sufficient in averment, then it is incompatible with the primary aspect—prays repugnant relief, makes a new case, and the demurrer should have been sustained; and if amended so as to make it a sufficient bill to redeem, the same result must follow." We dismissed the bill, "but without prejudice to the institution of another suit." We had concurred with the chancellor in his finding that the proof was not sufficient to set the mortgage aside as obtained fraudulently. The dismissal without prejudice could, therefore, have had but one purpose and meaning—a permission to complainant to file a new bill to redeem,—the only relief left open to him.

There is nothing either in the assignments or cross-assignments of error, and the decree of the chancellor is free from error.

What we have said is based on the postulate, that the averments of the cross-bill are true. The demurrer admits their truth. The present ruling must be interpreted in connection with our former decision in this case.—*Williams, Deacon & Co. v. Jones*, 77 Ala. 294.

Affirmed.



## Bedsole v. Peters.

### *Action on Common Counts, and to enforce Mechanic's Statutory Lien.*

1. *Joinder of common counts with special count to enforce lien.*—The common counts may be united with a special count seeking to enforce the statutory lien of a mechanic or material-man (Code, §§ 3440-61); and the plaintiff may have a personal judgment, though he fails to establish his lien.

2. *Description of premises sought to be charged, in claim filed, and in complaint.*—When the plaintiff seeks to enforce a lien, not only on the structure and improvements erected or made, but also on "one acre" of the land on which they are situated, the verified statement of his claim, as filed of record, and the complaint, must each describe the "one acre" with reasonable and convenient certainty, so that it may be identified and separated from the residue of the tract (Code, § 3444); but, though this description be indefinite and insufficient, whereby the lien fails as to the land, it may nevertheless be established and enforced against the structure and improvements.

3. *Sufficiency of verdict.*—The complaint containing the common counts and a special count, in which the structure and improvements sought to be charged are described with sufficient certainty; and issue being joined on the pleas of payment and set-off, with the general issue; a verdict finding "the issues in favor of the plaintiff, \$100," though informal, is sufficient to support a judgment declaring a lien in his favor, for that sum, on the structure and improvements.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. WM. E. CLARKE.

This action was brought by L. G. Peters against D. J. Bedsole, and was commenced on the 16th September, 1885. The complaint contained the common counts, and a special count which claimed \$203.60, "balance due on account for work and labor performed, for this: that heretofore, to-wit, on the 13th day of April, 1885, defendant employed plaintiff as a mechanic to perform the following work and labor; to construct and lay a frame foundation for a steam saw-mill, 80 feet long by 30 feet wide, at defendant's premises on lands owned by him on, to-wit, the S.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of sec. 24, T. 10, R. 1 east, in said State and county; to erect and put in running order therein, on said land, one steam-engine, one boiler, one circular saw, one saw-frame, [and] one truck-carriage, together with their respective fixtures, etc., all of which are hereinafter more particularly described; and then and there agreed to pay plaintiff for said labor as a machinist the sum of \$225 on the completion of said work. Plaintiff alleges that said work

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was completed, in a skillful and workmanlike manner, on, to-wit, August 29th, 1885; and that said defendant, though often requested, has failed and refused, and still fails and refuses to pay the balance due, or any part thereof, for the performance of said work and labor; which said several sums of money, with the interest thereon, are due and unpaid. Plaintiff alleges that he has filed with the probate judge of said county, within six months after the completion of said work and labor, to-wit, on September 15, 1885, a true and just account, verified as required by statute, of the demand due him for said work and labor, after all just credits have been given, together with a true description of the property upon which he hereby seeks to enforce his lien, and thereby declared his intention to claim his mechanic's lien for said work and labor, upon the following specifically described property of the defendant's, to-wit: One steam-engine, No. 32, with 9½ inch cylinder, 12-inch stroke, capacity 15-horse power, together with all fixtures thereto belonging, the same being branded *Oil City Pennsylvania Boiler Works*; one steam-boiler, weighing 5,000 lbs., capacity 20-horse power, with all fixtures thereto belonging, branded as above; one 48-inch diameter circular saw, and frame for the same, together with their respective fixtures, said saw bearing the brand *Harrisburg M. F. G. Co.*; one truck-carriage 22 feet in length, with all fixtures thereto belonging; one frame foundation for saw-mill, 80 feet long by 30 feet in width; and one acre of land in the S. ½ of the S. E. ¼ of section 24, township 10, range 1 east, in said county of Clarke, and upon which said engine, boiler, circular saw, saw-frame, and truck-carriage, with their respective fixtures, and said foundation for said saw-mill, are situated."

The defendant demurred to the special count, "because it does not specify with legal certainty the particular one acre of ground as that on which said improvements are alleged to have been made," and because it "fails to show that plaintiff has filed any legal and sufficient claim to a lien upon any certain and designated acre of ground." The court overruled the demurrer, and the defendant then pleaded the general issue, payment, set-off, and a special plea claiming a recoupment of damages on account of the alleged negligent and unskillful manner in which the work was done. Issue was joined on all of these pleas. The jury returned a verdict, in these words: "We, the jury, find the issues in favor of the plaintiff, \$100;" and the court thereupon rendered judgment for the plaintiff for \$100, and declared a lien on the saw-mill and fixtures, as described in the complaint, and on the one acre of land on which they were situated; ordering a levy and sale of the same, if other property of the defendant could not be found.

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The overruling of the demurrer to the complaint, and the judgment entered on the verdict, are now assigned as error.

H. PILLANS, and W. D. DUNN, Jr., for appellant.—(1.) The complaint is fatally defective, in failing to describe with sufficient certainty the particular one acre of land on which the improvements are situated.—*Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Lemly v. Iron & Steel Co.*, 65 Mo. 545; *Chandler v. Hanna*, 73 Ala. 390; *Turney v. Sanders*, 4 Gilm. 527. Nor is the description of the personal property sufficient, since its *situs* is no where described. (2.) The verdict is vague and indefinite, and did not authorize the judgment entered on it.—*Moody v. Keenan*, 7 Porter, 236; *Alexander v. Wheeler*, 69 Ala. 332; *Patterson v. United States*, 2 Wheat. 221; *Traun v. Wittick*, 27 Ala. 570; *Blocker v. Bumpass*, 2 Ala. 364.

F. G. BROMBERG, and J. F. LOCKLAND, *contra*, cited *Young v. Stoutz*, 74 Ala. 574; Phill. Mech. Liens, §§ 378–9; *N. G. Iron Works v. Strong*, decided by the Supreme Court of Minnesota, and reported in 21 N. W. Rep. 740; *Smith v. Headly*, 23 N. W. Rep. 550; 28 N. J. Law, 39; 23 Cal. 208; 11 Wisc. 214; 30 Wisc. 526.

SOMERVILLE, J.—We entertain no doubt of the propriety of joining in the same complaint with the common counts those upon contract for the enforcement of a mechanic's lien under the statute. The chapter in our Code relating to this subject provides, that the pleadings, practice, process, and other proceedings designed to enforce liens of this character, shall be the same as in ordinary civil actions, except as otherwise provided.—Code, 1876, § 3446. The statute, moreover, expressly provides for the rendition of a personal judgment against defendant debtors, and against garnishees who are required in certain cases to answer under oath.—Code, §§ 3552, 3449. When a complaint states the facts which show both a money demand due in debt or *assumpsit*, and a lien, and the proof shows the correctness of the amount claimed, but fails to sustain the lien under the statute, no reason is perceived why a personal judgment may not be rendered, even though the lien is not established by the judgment.—*Montgomery Iron Works v. Dorman*, 78 Ala. 218; *Williams v. Porter*, 51 Mo. 441; *Patrick v. Abeles*, 27 Mo. 184; Phillips on Mechanic's Liens, § 448.

The lien sought to be enforced in this case is one for work and labor performed by the plaintiff in the erection of a steam saw-mill, and certain fixtures and improvements connected



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with it, and belonging to the defendant. The lien is claimed to attach to the frame foundation of the structure, a steam-engine, a steam-boiler, and certain other fixtures and appurtenances, which are particularly described, and are stated to be situated upon a certain eighty-acre tract of land, and also to "one acre of land" in this tract, upon which these improvements are located. No other description of this particular acre of land is given, either in the complaint, or in the verified statement of the claim which was alleged to have been filed in the office of the probate judge, as required by the statute. Code, 1876, § 3444.

The complaint was sufficient, in our opinion, to secure a lien upon the erection and improvements described, but not upon the acre of land upon which they were situated. The statute confers a lien in favor of mechanics, employees, and material-men, both upon the building, erection, or improvements, and upon the land belonging to the owner or proprietor on which they are situated, "to the extent of one acre."—Code, § 3440. It is required that any person, seeking to enforce a lien of this kind, should file a verified statement in the office of the probate judge, setting forth not only a just and true account of his money demand, after all just credits have been given, but also "a true description of the property, or so near as to identify the same, upon which the lien is intended to apply."—Code, §§ 3444, 3445. The complaint must contain a like description of the property.—Code, § 3446. In the case of *Montgomery Iron Works v. Dorman*, 78 Ala. 218, we construed these sections of the Code to require that the particular acre of land, on which the lien is claimed, must be described with reasonable and convenient certainty—that it should, in other words, be "pointed out and designated by a description sufficiently certain to identify and separate it from the balance of the tract," with which it may be connected. The Missouri statute uses language identical with our own, and the Supreme Court of that State has placed on it a like construction.—*Williams v. Porter*, 51 Mo. 441. We can well see many inconveniences which must result from the practical application of this construction, where there several adverse claims, in each of which there may be an attempted description of the same acre with an overlapping conflict of areas. But the requirement is statutory, and we have no power to change it.

It is obvious that the description in the present case, under this rule, is void for uncertainty, and as to the land the lien must fail.

But it can be sustained, nevertheless, upon the building, erection, or improvements, they being described with reasonable certainty, as they clearly are in the present case. The

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declaration is clearly made in the statute, that the lien shall be good upon these structures, "and" upon the land on which they are situated, to the extent of one acre.—Code, §§ 3440, 3444. It is a several, and not a joint lien; and both the letter and spirit of the law contemplate that the improvements erected may, in proper cases, be subjected to sale and removal from the premises by the purchaser. While special provision is made in section 3443 for the sale of improvements located on leased lands, and in section 3442 for the enforcement of the same right in preference to any prior lien, incumbrance or mortgage, which may have been placed on the land before the erection of the improvements, the plain and natural meaning of the law is, that the right to subject the improvements to sale shall not be lost, because by accident or negligence the plaintiff has lost his lien on the land by failure to describe it. The policy of the law is to prevent the land-owner from unjustly appropriating to his own use the labor and material of the mechanic, employee, or material-man, by reason of the merger of these values into the freehold estate. The defendant can not complain that the plaintiff enforces his lien only on what the plaintiff has placed on his premises, and not also on the premises in addition to the improvement.—*Turner v. Robbins*, 78 Ala. 592. In *Kansas City Hotel Co. v. Sauer*, 65 Mo. 279, the same view was taken of the Missouri law, of which our own is a substantial copy.

The verdict of the jury, though informal, was sufficiently certain to support the judgment, so far as concerns the amount claimed. We construe it to mean, that the jury, after consideration of all the issues raised by the pleadings, find that the defendant owes the plaintiff the sum of one hundred dollars. This amount being ascertained by a jury, the court could well declare the lien to exist as matter of law, under the facts in evidence.—Code, § 3449; *Ex parte Schmidt*, 62 Ala. 252.

This lien, however, as we have said, must be confined to the improvements, erections and fixtures, which are described in the complaint, other than the land. The judgment will accordingly be reversed, and a judgment rendered in this court in favor of the appellee, the same as that rendered in the court below, except that no lien will be declared to exist upon the land. The costs of the appeal will be taxed against the appellee.

## Burke v. Roper.

### *Bill in Equity for Dissolution of Private Charitable Association, Account, and Distribution of Funds.*

1. *Charitable trusts; what are, and jurisdiction of equity over.*—A charitable trust, as known and recognized at common law, and sustained by courts of equity, was public in its nature, and the persons to be benefited by it were vague, uncertain, and indefinite, until designated as the beneficiaries for the time being; and where a common fund is created by voluntary contributions, its benefits being restricted to members of the association, it can not be considered a charitable trust, nor subject as such to be controlled by a court of equity.

2. *Voluntary charitable associations; jurisdiction of equity on ground of partnership.*—The jurisdiction of equity over such voluntary associations and their funds can not be sustained on the ground of partnership, since the members, whatever may be their relation or liability to third persons, are not partners *inter sese*; there is no mutual participation in profits or loss, no authority to bind or assign the common property, and no dissolution wrought by the death of a member.

3. *Same; considered as trusts.*—The jurisdiction of courts of equity over such voluntary associations and their funds is maintained, independent of the statute of uses, or of any prerogative power, on the ground of the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies.

4. *Same; jurisdiction to decree dissolution, and distribution of funds.* When the operations of such voluntary associations have been discontinued, its objects and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the several contributors in proportion to the amount contributed or paid by them respectively.

5. *Same.*—A new association being formed on the dissolution of the old, composed of some of the members with other persons, members of the same church, and made subject to such laws and restrictions as the church might prescribe; while an unauthorized dismissal of some of the members, by the arbitrary act of the minister in charge, without a trial or hearing, might afford grounds for legal proceedings to compel their restoration, such nugatory act would not authorize a court of equity, at their instance, to decree a dissolution of the association, or a distribution of the common fund among the members.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by William H. Roper and others, members of the Stone Street Baptist Church (colored) in Mobile, and also of two charitable associations organized among the members of said church; against Benjamin Burke, the pastor of the church, Hal Campbell and others, trustees of said associations, and other members who adhered to them, and against the partners composing the banking-house of Thos. P



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Miller & Co.; and prayed an account of the funds belonging to said associations in the hands of said bankers, and a distribution thereof among the several parties in interest. The bill was filed by the complainants "in behalf of themselves and such others as are entitled to participate in the moneys hereinafter mentioned, and whose rights are denied by the defendants," and contained these allegations:

(1.) In 1872, the complainants and others, members of said church, "formed and organized a society for the mutual benefit of such persons as should join therein and contribute to the funds to be raised," called the "Relief Treasury of the Stone Street Baptist Church;" the object and purpose of which was, "to create a fund for the purpose of nursing and caring for its members while sick, providing for them a means of support and the necessary maintenance and medical attention during illness, and to bury such of said members as should die from time to time." (2.) Each member of the society paid fifty cents on his admission, and twenty-five cents each month afterwards; and with the funds thus realized, the society paid all its expenses, defrayed all the charges incident to its organization and purposes, and accumulated a fund of about \$3,000, on deposit in the hands of Thos. P. Miller & Co., besides lending over \$600 to the church. (3.) In 1882, "it was found that a number of the members of the society were largely in arrears in the payment of their monthly dues, and it was thought by the society that it would be impossible for them to pay up the amounts they were in arrears; and for the purpose of continuing the association without further loss to such members as were unable to contribute to the funds thereof, and, at the same time, of placing the funds already on hand in such a position that those members who were in arrears should not lose the benefit of their previous contributions, it was agreed that said amount then on hand and due to said society should be deposited for their mutual benefit; but no stipulation whatever was made as to the future use that should be made thereof." About \$3,000 of said sum is now on deposit with said Thos. P. Miller & Co., and the sums borrowed by the church are still due and unpaid, with interest. (4.) "After said sum was so deposited with said Thos. P. Miller & Co. as a closed transaction, the majority of the members of said association formed themselves into a new body, called the *New Relief Treasury of the Stone Street Baptist Church*; but said new society was composed of the members of the former society, and was organized for the same purposes, and managed by the same trustees, and on the same principle as the former society;" a copy of the resolutions, treated by them as a constitution or charter, being made an exhibit to the bill. (5-6.) The new organization

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prospered, and on July 26th, 1884, had accenmulated about \$800, which was on deposit with said Thos. P. Miller & Co.; but the trustees had deposited it in their names as trustees of the church, instead of the society. (7.) A discussicn arose in the society "as to debarring some of the old and decrepit members belonging to said societies from any participation in the funds which had accumulated;" said Benjamin Burke, the pastor, insisting on "debarring all those who, from age or disease, were unable to continue their contributions," while complainant Roper and others opposed him. Burke became offended on account of this opposition, "and from that time on began to make insinuations and cast reflections upon said Roper, both in the meeting of the body and in the pulpit; and on one occasion, when said Roper looked at other complainants and smiled, he became highly offended, and summoned said Roper before a meeting of the congregation of the church, to answer for said offense." (8.) At said meeting, Roper not having made a satisfactory apology, "and demanding a fair trial of the matter under the rules of the church, said Burke declined to give him such a trial, and submitted it to a vote of the congregation, as to whether he should expel said Roper. Upon such vote, a majority of the congregation voted in favor of said Roper; and thereupon said Burke announced, that said Roper, and all others who voted to sustain him, were from that time dismissed from the church, and should not be permitted to participate in the benefits of the property belonging to the church, nor in the benefits derived from the accumulation of said fund by said societies." Since that time, complainants and the others so expelled have received no benefit from the fund, and have not been recognized by said Burke and his associates, who claim to have control and management of said funds, and deny that complainants have any rights or interest therein; and Thos. P. Miller & Co. refuse to account to or with either party, until the matter is adjusted by the courts. The bill therefore prayed, "that it be referred to the register to ascertain and report the amount of the funds belonging to said two religious associations, and to require the defendants to account for the same; and also to ascertain and report who are the parties entitled to said funds, and what portion thereof each is entitled to; and that the court will, on the coming in of the report, decree the amount of said fund, and the proportion thereof due to each of complainants, and to such other persons as may be shown to be entitled to participate therein; and will cause the said funds to be paid into court by said Thos. P. Miller & Co., and to be equitably distributed among the parties entitled thereto;" and for other aud further relief, under the general prayer.

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Burke and his associates filed a demurrer to the bill, assigning the following grounds of demurrer: (1.) The bill shows that complainants have no interest or property in the funds under the control of these defendants, and they show no right to the relief prayed. (2.) As to the parties named in an exhibit to the bill, and alleged to be members of the relief societies, the complainants show no right to represent them. (3.) The bill, with the exhibits, shows that all the contributions "have gone into a common treasury, and that this court has no authority to compel the society, through these defendants or T. P. Miller & Co., to refund the money so contributed." (4.) The facts stated as to the trial of Roper, the expulsion of him and others, and the subsequent declarations of Burke, do not furnish any ground for equitable relief. (5.) The bill does not show that the complainants ever sought relief from the church, or offered to pay their monthly dues after their expulsion; nor does it appear that they have not, by delinquency in payment of their monthly dues, forfeited all right to participate in the benefit of the relief fund. (6.) Complainants show that they participated for many years in the benefits of said society, down to the time when they ceased to pay their dues; and they have thereby waived all right to call these defendants to account as to these matters. (7.) The moneys in the hands of T. P. Miller & Co. constitute a trust fund, which is specially dedicated to a particular purpose, and is under the control of an organized body, either the church or the relief society named, neither of which is made a party to the bill. The chancellor overruled the demurrers, and his decree is now assigned as error.

D. C. ANDERSON & SON, for appellants, cited the following cases: *Burdine v. Grand Lodge*, 37 Ala. 481; *Morton v. Smith*, 5 Bush, Ky. 467; *Mears v. Moulton*, 30 Md. 142; *Penfield v. Skinner*, 11 Vermont, 296; *Beaumont v. Meredith*, 3 Vesey & B. 180; *Thomas v. Ellmaker*, 1 Parson's Sel. Cases, 98.

G. L. SMITH, *contra*, cited Perry on Trusts, §§ 160, 885; Hill on Trustees, 185, 519; *Esterbrook v. Tillinghast*, 5 Gray, 17; *Platt v. Williams*, 2 McLean, 308; *Robbins v. Battle House Co.*, 74 Ala. 504; Story's Eq. Pl., § 497.

CLOPTON, J.—"The Relief Treasury of the Stone Creek Baptist Church" is an unincorporated association, organized for the purposes of nursing and caring for sick members, providing necessary maintenance, and medical attention during illness, and of burying such as should die from time to time. The common fund was created by initiation fees and monthly



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contributions. Such fund is not a charitable trust, as recognized and known under the common law, and sustained by courts of equity. The requisites to such trusts are, that they must be public in their nature, and the persons to be benefited must be vague, uncertain, and indefinite, until designated as the particular beneficiaries for the time being. A common fund, created by voluntary contributions, the benefits being restricted to the members of the association, has not, ordinarily, been considered a charitable fund, subject to be controlled by a court of equity.—2 Perry on Trusts, § 710.

The purposes and objects of the society are praiseworthy and benevolent. Such association is organized for private charity, intended to raise a fund for the mutual benefit and assistance of the members, which is impressed with a trust character, and is placed at the disposal, and subject to the management, of persons who sustain a fiduciary relation. Such associations have become common, and can not be excluded from the domain of jurisprudence, without a conceded inadequacy of the law and the courts to enforce and protect substantial rights, to encourage the amelioration of the ills of humanity, and to foster the cultivation of the highest virtue. The right of the members to sue, in respect to matters pertaining to, or affecting their individual interests, has been repeatedly asserted.—*Means v. Moulton*, 30 Md. 142; *Anon.*, 3 Atk. 276; *Penfield v. Skinner*, 11 Vt. 296; *Lloyd v. Loaring*, 6 Vesey, 773.

Such voluntary associations, not having any well defined legal *status*, have been considered and treated by learned jurists, under the pressure of necessity, as partnerships. In *Beaumont v. Meredith*, 3 Ves. & Beames, 180, in respect to a society for the relief of the members in sickness, Lord Eldon says: "This society can be considered, in this court, only as a partnership, and neither has nor can have a corporate character." The question in the case involved the necessary parties to a suit brought by some members against the trustees, for an account, alleging an unauthorized dissolution. It has also been held, that the members, in their relations to third persons, are to be regarded as partners, the same as individuals associated for any business enterprise.—*Rabb v. Reed*, 3 Rawle, 151. There is no mutual participation of profit or loss; the death of a member does not operate a dissolution; and the members, as such, have no authority to bind or assign the common property. Whatever may be their relation and liability to third persons, they are not partners *inter sese*.—*Thomas v. Ellmaker*, 1 Par. Sel. Cas., 98. The jurisdiction of courts of equity, in such cases, must be founded on principles and relations more consonant with the purposes and intentions of the members.

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The doctrine of charitable trusts is recognized, accepted, and administered in this State, in a modified and limited form; reasonable certainty as to the uses being required, and the doctrine of *cy pres* having been rejected. The jurisdiction, which a court of equity exercises over such trusts, is held to be independent of the "statute of uses," or any prerogative power of the court, and to rest on its original and inherent power to sustain such trusts, because of their charitable uses, which would be otherwise held void.—*Williams v. Pearson*, 38 Ala. 299. On account of their nature, and the peculiar means employed to carry out their purposes, it may be impracticable for a court of equity to control, enforce and execute some of the main and ultimate uses and objects of a voluntary association; but this is not a sufficient reason why the common fund should be exempt from the control of courts of equity. The jurisdiction may be safely and consistently rested on the original and inherent power of the court to uphold and execute trusts generally, and to sustain trusts for private charity, because of their charitable uses, though the association may be voluntary, and the trust may be regarded as executory in part, by reason of the accumulations of the common fund by voluntary contributions in the future. Trustees may be held to account; the perversion of the fund to foreign and unauthorized uses may be prevented, and its proper appropriation enjoined. Such fund may be regarded, in legal contemplation, as a trust fund for private charity, subject to be controlled *as such* by courts of equity, on the general principles of the equitable doctrine relating to a public charitable trust, as now qualified and limited; but modified by the rules which ordinarily govern private express trusts, so far as applicable and capable of enforcement. The ground of jurisdiction is the trust nature of the fund, and its charitable use, and the inadequacy of legal remedies.

The bill alleges, that the association had accumulated a large sum by contributions, three thousand dollars of which were deposited with the banking-house of T. P. Miller & Co., which still remain on deposit, and the balance was loaned to the church, which is still unpaid. It having been ascertained, in 1882, that a number of the members had become so largely in arrears that it would be impossible for them to pay the past monthly dues, it was agreed, for the purpose of continuing such association without loss to those who were able to contribute, and of placing the fund in a position that those in arrears might not lose the benefit of their previous contributions, that the amount on hand should be deposited for their mutual benefit, without stipulation as to the future use of the fund. Thereafter, a majority of the members organized a new association, under the name of the "New Relief Treasury of the

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members of the Stone Creek Baptist Church ;” the two associations having no connection with, or relation to each other, as organized societies. Admitting the allegations of the bill, which, of course, are taken as true on demurrer, the first association ceased all operations about three years before the filing of the bill ; its purposes were abandoned, and the accumulated fund has been preserved for the mutual benefit of the contributors, but has not been devoted to the charitable uses. Generally, when the objects of a private express trust fail, the subject-matter of the trust reverts to the donor. The objects and uses of the association having entirely failed, and its operations being discontinued, a court of equity has jurisdiction to declare it dissolved, and to distribute the fund among the contributors to whom it reverts, in the proportion of the amounts respectively contributed.

The new association occupies a different position. From the constitution, a copy of which is appended as an exhibit to the bill, it appears that the members of the church are members of the association. Its officers are confined to the “Deacon Board,” appointed by, and subject to such restrictions and laws as may be prescribed by the church. It is an organization within, incidental to, and controlled by the church. Conceding the allegations of the bill, the conduct of the pastor is inexcusable—a usurpation of arbitrary power, to dismiss complainants and others from the church and the association, without a hearing and trial, and contrary to a vote of a majority of the members. Such dismissal is nugatory, and is not sufficient cause for distribution of the fund. No action has been had by the association, or by the church. The operations of the association have not ceased, nor have its objects entirely failed. So long as it is in existence, and continues its authorized operations, no member has the right to withdraw the amount contributed by him. If either of the complainants has been illegally deprived of his rights of membership, or ousted of his functions as trustee, it may be that, on proper proceedings, he would be restored and reinstated ; but, on the case made by the bill, the fund raised by the new association can not be distributed among the members.

The want of necessary parties, and multifariousness, are not assigned as causes of demurrer, and are not considered nor determined.

The fourth cause of demurrer should have been sustained. As to the other causes, the demurrer, going to the entire bill, was properly overruled. The decree will be accordingly amended, and as amended affirmed. Let the costs of appeal in the Chancery Court be divided.



[Marshall, Davis &amp; Co. v. McPhillips.]

**Marshall, Davis & Co. v. McPhillips.***Motion to Dismiss Appeal.*

1. *When decree is final; when appeal lies.*—Under a bill filed by creditors, asking the settlement of a deed of assignment for their benefit, the court having taken jurisdiction of the trust, and ordered a reference to the register to ascertain and report who were creditors, the amount of their debts, &c., directing him to make publication, and declaring all claims barred which were not presented within the time specified; a decree rendered at the next term, on pleadings and proof, after the confirmation of the register's report, declaring those whose claims were allowed to be the only creditors, allowing their claims for the amounts respectively specified, and directing the trustee to make ratable distribution among them, to report his action from time to time to the court, and to remain under its protection and direction in the execution of the trust and the decree, is a final decree, from which an appeal will lie.

2. *Petition; when proper, and what relief may be had under.*—After the rendition of a final decree, and the adjournment of the term at which it was rendered, a petition can not be entertained asking relief which varies its terms, or which is inconsistent with the principles settled by it; though matters relating to the taking of the account, or otherwise pertaining to the execution of the decree, are properly presented by petition.

3. *When appeal lies.*—An appeal does not lie from the chancellor's ruling sustaining a demurrer to a petition, asking relief inconsistent with a final decree rendered at a former term, although an appeal may not be barred from that final decree.

APPEAL from the Chancery Court of Mobile.

Heard before the HON. JOHN. A. FOSTER.

L. H. FAITH, for the appellant.

HANNIS TAYLOR, *contra*.

STONE, C. J.—The Danner Land and Lumber Company, a private corporation, made an assignment of its property and effects to Strong as trustee, or assignee, for the benefit of all its creditors. McPhillips, one of the creditors, filed the bill in this cause, "in behalf of himself and all other creditors of said corporation, who may see fit to make themselves parties hereto, and contribute their due proportion to the expense of this suit;" and the said corporation and Strong, the assignee, were made parties defendant. The object of the bill was to have the trust administered in the Chancery Court. The bill was properly put at issue, and on the 9th day of February, 1885,

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the court made a decretal order, taking jurisdiction of the trust and its administration. The court further proceeded to make an order of reference in the cause, directing the register to make publication in a certain manner, and to receive proof of claims against the trust property, until May 1, 1885. The order further declared, that "any creditor, failing to present and file his claim within the period herein limited, shall be deemed to have waived his right to share in the further distribution of said assets in said trustee's hands, or payment of his said claim out of the sum, save only" creditors having special liens. From May 1st, to June 1st, was allowed for contesting claims; "and no objections shall be considered by the register, which are not filed on or before the said first day of June." The register was then required to make his report of claims filed and proven, to the next term of the court.

The register proceeded according to the directions of this order, and at the next term made his report of claims proven before him, amounting to near sixty-two thousand dollars. That report was read in open court June 25, 1885, and, no exceptions being filed, it was confirmed July 6, 1885. Among the creditors whose claims were thus reported and allowed were the Stonewall Insurance Company, Marshall, Davis & Co., and Hannon & Michael.

On the 7th day of July, 1885, the said cause was submitted for decree, and the decree was rendered on the 9th of the same month. The decree declares, "this cause being submitted by the parties thereto on this day for further decree, and coming on to be heard on the pleadings and the decrees heretofore entered in the cause, and on the report of the master upon claims, and the decree confirming the same, and on the motion of the assignee, Joseph C. Strong, for a final decree ascertaining and determining who are the creditors of the Danner Land and Lumber Company, entitled to share in the distribution of the assets of said company in said assignee's hands: Upon consideration, it is ordered, adjudged and decreed, that the persons, firms and corporations reported by the register in his report heretofore read and confirmed in this cause, and none others, are the creditors of said Danner Land and Lumber Company, and entitled to share in the distribution of the estate of said Danner Land and Lumber Company in said assignee Strong's hands, under said deed of assignment; and their claims and demands are in the amounts in and by said report set forth, and none others." The decree then gave certain directions, not bearing on the question of its finality, and concluded as follows: "and it is further adjudged and decreed, that said assignee, Strong, shall, in making distribution under said trust deed, pay ratably to all said creditors as the same are

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herein ascertained, and upon their claims as the same are herein determined; and he shall, from time to time, make report of his doings, and file accounts in this court, and remain under the protection and direction of this court in executing his said trust, and carrying out this decree." This decree was rendered in term time.

There can be no question that this decree of July 9, 1885, was final. It settled and determined all the equities raised by the record, and left nothing to be done, save the execution of the decree, and a decree for the costs. An appeal to this court would have lain from that decree as a final decree.—*Bank of Mobile v. Hall*, 6 Ala. 141; *Jones v. Wilson*, 54 Ala. 50; *Hastie v. Aiken*, 67 Ala. 313; *Cochran v. Miller*, 74 Ala. 50, 61; *May v. Green*, 75 Ala. 162; *Adams v. Sayre*, 76 Ala. 509; *Gresham v. Ware*, at present term.

Long after the adjournment of the term at which the foregoing decree was rendered—namely, October 19, 1885—the Stonewall Insurance Company, Marshall, Davis & Co., and Hannon & Michael filed their petition in this cause, and prayed to be let in to file and prove larger claims against the trust, than they had filed and had allowed under the decree of reference, the report on which had been confirmed without exceptions, and was made the basis of the decree of July 9, 1885. There was a demurrer to this petition, which the chancellor sustained; and from that decree the present appeal is prosecuted. The ruling on that demurrer is the sole error assigned in this court.

The petition in this case came too late. After final decree and the adjournment of the term, no relief can be obtained in the court rendering the decree, either on petition or motion, which varies the terms or principles settled by the decree. *Pettus v. McClannahan*, 52 Ala. 55; *Ex parte Cresswell*, 60 Ala. 378; *Cochran v. Miller*, 74 Ala. 50. This rule, however, extends only to the principles settled—what may be styled the equity of the bill. It does not apply to mere matters of taking the account, until after the same has been taken and decreed on, nor to matters which simply pertain to the execution of the decree.—*Cochran v. Miller, supra*. The relief prayed for, if obtainable as matter of right in any form, can not be obtained on petition. That form of remedy lies only in causes pending, and in reference to matters which have not passed beyond the power of the chancellor to review them. 2 Dan. Chan. Pr. \*1603, *et seq.*; Adams' Eq. \*348, *et seq.*

The ruling on the petition, although final as to the matter therein presented, was not a final decree in the cause from which an appeal would lie.—*Randle v. Boyd*, 73 Ala. 282. And if this be the only decree in the cause, it would seem to



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be our duty to dismiss the appeal.—*Cochran v. Miller, supra.* There is, however, a final decree, as we have shown above, and the right of appeal from that decree is not yet barred. That final decree has not been appealed from. The present appeal is, in express terms, taken from the ruling of the chancellor on the petition filed by the Stonewall Insurance Company and others, and the assignments of error question only the correctness of that ruling.

The appeal must be dismissed.

## Farley, Spear & Co. v. Moog.

*Bill in Equity by Partnership Creditors, against Surviving Partner and Individual Attaching Creditors.*

1. *Rights of surviving partner, in and to partnership property.*—On the dissolution of a partnership by the death of one of its two members, the surviving partner is entitled to the exclusive possession of the partnership property; but he holds the assets as a *quasi* trustee, first for the partnership creditors, and afterwards for the personal representative of the deceased partner; and while the courts will not interfere with his management, so long as he continues faithful to his trust, a court of equity will often intervene to afford relief against waste, negligence, misconduct, or other violation of duty on his part, prejudicial to the rights of the party complaining.

2. *Execution or attachment against individual partner, levied on partnership property.*—When an execution or attachment against an individual partner is levied on the partnership property, the purchaser at a sale under the levy acquires only that partner's interest in the assets which may remain after the partnership debts have been paid and the partnership affairs adjusted; and this can only be ascertained by an account in equity.

3. *Rights of partnership creditors, on dissolution of partnership, insolvency and misconduct of surviving partner.*—Strictly speaking, partnership creditors have no lien upon the partnership assets for the payment of their debts, though they are entitled to priority of payment over individual creditors; yet, where the surviving partner becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 21st January, 1885, by Farley, Spear & Co., a partnership doing business as bankers in the city of Montgomery, and claiming to be creditors of the late firm of A. & B. Moog, a mercantile partnership doing business as wholesale grocers and liquor-dealers in the city of

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Mobile; against Bernard Moog, the surviving partner of said firm, the sheriff of Mobile county, Marcus Lyons and others, creditors of said Bernard Moog individually, who had sued out attachments against him, which had been levied on the stock of goods in his possession. According to the allegations of the bill, the firm of A. & B. Moog was dissolved, by the death of A. Moog, in March, 1884, being then indebted to the complainants, balance on accounting, in the sum of \$1,800, or more. On the 10th April, 1884, complainants brought suit in the Circuit Court of Mobile, against said B. Moog as surviving partner, and recovered a judgment against him, on the 17th January, 1885, for \$1,940.84. A copy of this judgment was made an exhibit to the bill; and it was alleged that, on the same day it was rendered, on special motion to the court, an execution was ordered and issued, and was still in the hands of the sheriff when the bill was filed. It was further alleged that, after the death of said A. Moog, the surviving partner, "instead of winding up said partnership business as the law directs, and keeping the assets of said late firm intact, as he should have done, for the benefit of the firm creditors, has continued to do business with said assets in his own name, claiming, dealing and trading with said assets, in the store of said late firm, as if said stock was his individual property;" that he made daily sales, and replenished the stock, from time to time, with the proceeds of sale, but the principal part of the stock in trade remained substantially the same; that he had no individual means with which to make purchases, and used the assets and moneys of the firm for that purpose, mingling his new purchases with the stock on hand. The several attachments were sued out on the 12th, 13th, and 14th January, 1885, and were levied on the stock of goods in the store; and it was alleged that the sheriff, acting under orders of the Circuit Court to which the several attachments were returnable, had sold a part of the goods levied on, and had advertised the residue for sale. An amendment of the bill was afterwards allowed, which alleged that said Bernard Moog was insolvent, and that the firm of A. & B. Moog was insolvent at the time of its dissolution by the death of said A. Moog.

The prayer of the bill was expressed in these words: "Orators pray that this hon. court will take jurisdiction of the whole trust arising out of the dissolution of said late firm of A. & B. Moog, and will require said Bernard Moog, as surviving partner, to accounts for all assets of said firm which came to his hands as such surviving partner; and will charge him with all profits, if any, that have been made by him out of the assets of said firm; and will decree payment of the said judgment in favor of your orators; and will then order such a statement of

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the partnership accounts as will show what interest said Bernard Moog individually possesses in the same; and will decree, out of the individual interest of said Bernard Moog in the same, payment of the several individual debts of said Bernard which have been secured by the several attachments hereinabove described, according to their legal priority; that a receiver may be appointed for the preservation of said trust fund pending this suit, to take possession of all the assets of said late firm of A. & B. Moog, including the stock of merchandise now in hands of the sheriff of Mobile county; that said sheriff be restrained by injunction from making any sales of said stock whatever, until the further order of this hon. court; and for such other and further relief as to the court may seem meet and proper."

Demurrers to the bill were filed by the several attaching creditors who were made defendants, and by the sheriff, the causes of demurrer specifically assigned being, in substance, as follows: 1st, that the complainants showed no interest or title in or to the attached property, nor any lien upon it, which could in any manner supersede or override the lien of the several attachments; 2d, that complainants had a complete and adequate remedy at law; 3d, that the sheriff was improperly joined as a defendant; 4th, that no reason was shown for interfering with his possession by the appointment of a receiver. The chancellor sustained the demurrers, and his decree is now assigned as error.

TROY, TOMPKINS & LONDON, and HANNIS TAYLOR, for appellants.—The bill seeks to enforce an equitable lien in favor of partnership creditors, upon partnership assets in the hands of an insolvent surviving partner, upon which attachments against him individually have been levied. It is admitted that partnership creditors, as such, have no lien upon the partnership assets for the payment of their debts; but the several cases in which this principle is asserted, further declare that, under certain circumstances, a lien in their favor may be worked out through the surviving partner, who is a trustee for their benefit, and to those rights they may be subrogated; and the equity of the bill rests on this well-settled doctrine.—*Hart v. Clark*, 54 Ala. 494; *Warren v. Taylor*, 60 Ala. 223; *Reese v. Bradford*, 13 Ala. 846; *Donelson v. Posey*, 13 Ala. 268; *Evans v. Winston*, 74 Ala. 351; Story's Part. §§ 509-10; *Andrews v. Brown*, 21 Ala. 437; *Strange v. Graham*, 56 Ala. 614; High on Receivers, § 532. The complainants have reduced their debt to judgment against the surviving partner, and their execution is a lien on the partnership assets in his hands; and the prior levy of the defendants' several attach-



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ments can give them no right to priority of payment. A purchaser at a sale under execution against an individual partner, or under attachment against him, acquires only a right to an account in equity, and to receive the surplus which may remain after the partnership debts have been satisfied.—*Andrews v. Keith*, 34 Ala. 722; *Taylor v. Fields*, 1 Vesey, 396; *Ex parte Ruffin*, 6 Vesey, 119; Parsons' Part. 351. The insolvency of the dissolved partnership and of the surviving partner gives additional equity to the bill, requiring the assets to be marshalled, and the sale under attachment to be enjoined.—*Moore v. Sample*, 3 Ala. 319; *Coffin v. McCullough*, 30 Ala. 107; *Emanuel v. Bird*, 19 Ala. 596; *Smith v. Mallory*, 24 Ala. 628; *Case v. Beauregard*, 99 U. S. 119, 101 U. S. 689; *Daniel v. Owens*, 70 Ala. 297.

G. B. CLARK & F. B. CLARK, PILLANS, TORREY & HANAW, and DESHON & LAY, for the several appellees, submitted separate briefs, in which they made the following points: (1.) Partnership creditors have no equitable lien on partnership assets for the payment of their debts.—Story on Partnership, 509-10; *Reese v. Bradford*, 13 Ala. 837; *McGowan v. Sprague*, 23 Ala. 529; *Clark v. Mayer*, 40 Ala. 270; 55 Miss. 597. (2.) The complainants have no standing in court as judgment creditors of the dissolved partnership, because of their judgment against the surviving partner.—*Reese v. Bradford*, 13 Ala. 864; *Boykin v. Cook*, 61 Ala. 472. (3.) No right of subrogation, however, can be worked out through the surviving partner, who, on the allegations of the bill, could not ask the aid of a court of equity to set aside his own wrong, and compel him to pay his debts out of property in his own hands. (4.) A creditor of an individual partner may levy his execution or attachment on partnership property, and a court of equity will not enjoin the sale, except under special circumstances.—*Moore v. Sample*, 3 Ala. 319; *Moody v. Payne*, 2 John. Ch. 548; *Daniel v. Owens*, 70 Ala. 297. (5.) No injunction is prayed against the attaching creditors, but the effort is made to restrain the sheriff, the mere ministerial and executive officer of the court of law, from selling the property under the orders of that court. This can not be done, and the sheriff was improperly joined as a defendant.—2 Story's Equity, §§ 875-87; 1 High on Injunctions, §§ 45-6; *Freeman v. Howe*, 24 Ala. 450; *Buck v. Colbath*, 3 Wall. 340; 14 Otto, 228; 6 Ired. Eq. 199; 1 Barb. Ch. 273; 2 Heisk. 423; 1 Tenn. Ch. 124; *McNeill v. McNeill*, 36 Ala. 109; *Shrader v. Walker*, 8 Ala. 244. (6.) If any part of the stock of goods on hand belonged to the dissolved partnership, it was subject to the complainants' execution at law; but, as to new goods

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purchased by the surviving partner, and mingled with the old stock, they can neither reach them by execution, nor enforce a trust in them.—*Case v. Beauregard*, 99 U. S. 119; 3 Sneed, 462; 4 Humph. 233; 22 Penn. St. 16; 30 Ala. 164; 40 Ala. 518.

SOMERVILLE, J.—Upon the dissolution of a partnership, the assets of the firm pass to the surviving partner, the legal title and possession becoming vested in him. For many purposes he is, at law, the legal owner of such property, with power to sell or transfer it *ad libitum*. But, in equity, he occupies the relation of *quasi* trustee, towards both the personal representative of the deceased partner and the creditors of the partnership. It is said by Mr. Parsons, that “surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after by courts of equity.”—Parsons on Partnership, 442; *Davis v. Sowell & Co.*, 77 Ala. 262. Other authorities regard them as trustees in a more modified sense. This trust originates from the duty imposed on them by law, which is to appropriate the partnership property to the payment of the partnership debts, and to wind up the business of the concern with due diligence and good faith. His powers are accordingly commensurate with this duty, and, so long as he continues faithful to his trust, his exclusive right of possession and management will not be interfered with by the court, but will be protected. But, if he be unfaithful to his trust, or be guilty of any negligence, waste, misconduct, mismanagement, or other wrong, prejudicial to the right of any party interested, a court of equity will often intervene to afford relief. The circumstances under which this will be done can not be stated with greater certainty by any general rule, which is applicable to all cases.—Parsons on Partnership (3d Ed.), \*440, \*446; 3 Kent’s Com. (12th Ed.) \*64; *Case v. Aberly*, 1 Paige, 398.

In this State, the principle prevails, in accordance with the general weight of authority, that, where the interest of one partner in partnership property is levied on and sold under attachment or execution, based on the individual debt of such partner, the sale can be made only subject to the equitable lien of the firm debts and liabilities; and the purchaser acquires nothing more than what remains of the individual partner’s interest, after a settlement of the partnership affairs, and the payment of the debts of the concern out of its assets thus subjected to sale. In other words, the effects of a partnership can not be taken by attachment or execution to satisfy a creditor of one of the partners, except to the extent of his interest in the effects after settlement of the partnership debts. He thus pur-

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chases a mere right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which may be ascertained to exist upon a settlement—which may be something or nothing.—*Warren v. Taylor*, 60 Ala. 218; *Andrews v. Keith*, 34 Ala. 722; *Daniels v. Owens*, 70 Ala. 297; *Parsons on Partnership* (3d Ed.), \*350, \*351; *Coll-yer on Part.* (Wood's Ed. 6th), 187, *note*; 2 *Story's Equity Jur.* § 677.

The creditors of a partnership, as such, can not be said, ordinarily, to have any lien upon the partnership assets for the payment of their claims against the firm. Such a lien or equity, strictly speaking, exists only in favor of the partners themselves, or their personal representatives; and they alone can assert it, as a general rule. Yet there are circumstances, under which, according to the better view, a court of equity will aid partnership creditors in asserting a priority of payment out of partnership property, in preference to individual creditors, even though the latter may have acquired a lien by attachment, or otherwise, as in this case, on the interest of one of the partners. This right of creditors to a *quasi* lien, when it exists, it is true, can be worked out only through the partners themselves, being derivative, and in the nature of a right by subrogation. It is commonly held, for this reason, to be lost, whenever the partners themselves part with their interests in the partnership effects, by making a *bona fide* sale of them for a valuable consideration, or, as is sometimes said, “a sale *bona fide* and upon a full and fair consideration.”—*Mayer v. Clark*, 40 Ala. 259; *Story on Partnership* (7th Ed.) § 360, *note* 3.

The creditors may, in our opinion, avail themselves of this *quasi* lien, in cases where there has been a dissolution of the firm by death of one of its members, and the insolvency of the surviving partner has supervened. We need not carry the principle farther than this at present, as the necessities of the case do not require it, although the authorities, perhaps, go even further. Mr. Story argues it to exist in cases where there is a dissolution by either the death or bankruptcy of one partner. “In case of a dissolution,” he says, “each partner holds the joint property, clothed with a trust to apply it to the payment of the joint debts, and subject thereto to be distributed among the partners according to their respective shares therein;” and he adds, that “it is only in cases where there is a dissolution by the death or bankruptcy of one partner, that the right of the joint creditors can attach, as a *quasi* lien, upon the partnership effects, as a derivative subordinate right, under and through the lien and equity of the partners.”—*Story on Partnership* (7th Ed.), §§ 360, 361. In *Pearson v. Keedy* (6 B. Monroe, 128; s. c., 43 Amer. Dec. 160), it is said: “The cred-



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itor of the firm has no such lien in himself, but only a derivative equity based upon the rights of the partners themselves, in virtue of which he may, in case of the death of one of the partners, and the insolvency of the survivor, be *substituted* to the rights of the deceased, or his representatives, to have the partnership effects appropriated to the partnership debts. But this right of substitution is based on necessity arising from the insolvency of the survivor, and the consequent insufficiency of the legal remedy." Mr. Parsons also recognizes the existence of such an equity upon the supervening dissolution and insolvency of a partnership, and asserts that, while it may not be created by this *status* of the firm, it is brought into prominence, and the courts of equity often recognize and enforce such a preference. "If the private creditor," he observes, "levies on the joint property, and, on an account being taken to find the amount covered by the levy—viz., the debtor's share—if it appear that there is enough to satisfy both the joint and separate creditors, the former can not be said to be preferred. If there is not enough to satisfy both, then there is an insolvency, and the joint creditors are preferred. So, in the case of marshalling assets." "This, therefore," he adds, "seems to be the sense in which the numerous cases are to be taken which admit the equitable lien only in case of insolvency."—Parsons on Part. (3d Ed.), 375, 378 (\*346, \*349), and note (g) on page 375. The doctrine, that firm assets must first be applied to the payment of the firm debts, has been said to be "a principle of administration," adopted by the courts where they are called on to intervene in winding up the partnership business; and it is applied where no valid charge upon, or disposition of the assets, has been created or made by the firm.—*Schidlapp v. Currie* (55 Miss. 597); s. c., 30 Amer. Rep. 530. It can not, therefore, be said to rise to the dignity of a strict lien, in the full sense of the word. It is an equity of preference or privity closely approximating a lien, based upon obvious principles of justice; and is a fit correlative of the other principle, now settled in this and some other States, that, in cases of insolvency, the separate creditors have a primary claim upon the separate property of the partners, and that partnership creditors are not entitled to share with them, *pari passu*, in the estate of a deceased partner, when insufficient to pay separate debts, and the surviving partner has a joint fund in his hands.—*Smith v. Mallory*, 24 Ala. 628; Story on Partnership, § 363. The justice of the rule is commonly said to consist in the fact, that the joint and several debts were each incurred upon the faith of the joint and several funds respectively.

In view of these principles, we are of opinion that the com-

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plainants' bill had equity in it, and should not have been dismissed. The attachment levied on the property by the individual creditors might, at law, it is true, reach the entire assets in the hands of the surviving partner, the legal title of which has vested in him. In equity, it reached only his interest in the firm property after the payment of the firm debts; and no remedy existed to ascertain this, and afford protection to complainants' rights, except in a court of equity. The surviving partner, being a trustee of these assets, was liable to account for them; and he being insolvent, an equity would be enforced in favor of partnership creditors, by which they would have priority of payment out of the partnership assets, no valid alienation having been previously made of such property, and no valid incumbrance having been created on it at the time of the filing of the bill. Equity will assume jurisdiction, not only upon the idea of a trusteeship in the surviving partner, and of his alleged misconduct in the mismanagement of the partnership effects, but of the existence of a *quasi* lien in the partnership creditors, brought into existence by the dissolution of the partnership, and the insolvency of the surviving partner; to which may be added the complication likely to arise from a sale under the attachment proceedings, and the inadequacy of a court of law to ascertain the interest of the surviving partner in the partnership effects, and afford protection to its creditors. *Hubbard v. Curtis*, 8 Iowa, 1; *Washburn v. Bank*, 19 Vt. 278; *Parsons on Partnership* (3d Ed.) 282-283; *Freeman v. Stewart*, 41 Miss. 138; *Menagh v. Whitwell*, 52 N. Y. 146; s. c., 11 Amer. Rep. 683; *Bank v. Wilkins*, 9 Me. 28; *Skidmore v. Collier*, 15 N. Y. 50; *Blackwell v. Rankin*, 7 N. J. 152; *Pearson v. Keedy*, 43 Amer. Dec. 160; *Tenny v. Johnson*, 43 N. H. 144; *Tillinghast v. Champlain*, 4 R. I. 173.

We cite the foregoing authorities without intending to in-dorse some of them, which carry the doctrine of a creditor's lien further than sound principle would probably justify.

The complainants would be entitled to reach only such assets as originally belonged to the firm, or such as were purchased with trust money belonging to the firm, which may have come into the hands of the surviving partner, as the proceeds of sale of the partnership goods or otherwise. We do not construe its purpose to extend further.

The demurrer was improperly sustained to the bill; and the decree of the chancellor must be reversed, and the cause remanded.

**Lane & Bodley Co. v. Jones.***Action by Material-Man to enforce Statutory Lien.*

1. *Material-man as original contractor; time of filing claim.*—A person who furnishes materials for a planing-mill, under a contract with the owner of the property, is an original contractor (Code, §§ 3440–44), and may file his claim of lien at any time within six months after his indebtedness has accrued.

2. *Description of premises sought to be charged, in claim filed, and in complaint.*—When the claim of lien as filed for record, and the complaint, each describes with sufficient certainty the lot on which is situated the building or erection sought to be charged, it is no objection that a lien is also asserted and claimed on “the wharf and water privileges in front.”

3. *Acceptance of note; when operates as payment.*—The acceptance of a debtor's promissory note does not operate as payment of an antecedent debt, unless it is so received by agreement, express or implied; but the right of action is suspended until the maturity of the note.

4. *Same; waiver of lien.*—The acceptance of the debtor's note is not a waiver of the contractor's statutory lien, unless it is received in payment of the debt, or unless the right of action is thereby postponed beyond the time prescribed by the statute for the enforcement of the lien; but the plaintiff can not maintain an action to enforce his statutory lien, without producing and surrendering the note, or satisfactorily accounting for its absence.

5. *When claim of lien must be filed for record.*—When materials are furnished for the construction or repair of a building, under a “single continuing contract,” the time within which the statement of claim must be filed for record begins to run from the delivery of the last items; but, when furnished under separate orders or requests, though in pursuance of a general agreement or understanding to furnish, from time to time, such materials as may be needed, and as ordered, each order is a separate contract, and the statement must be filed within the prescribed time after each delivery.

6. *Application of payments.*—When the debtor does not direct, and the creditor does not make, a special application of a payment at the time it is made, but it is entered as a general credit on general account, the creditor can not afterwards make a special application to serve his interests as subsequently developed.

7. *Statement of account or claim as filed, without allowing credits.* The claim of lien, as filed for record, is required to state a “just and true account of the demand due after all just credits have been given;” and the intentional omission of just and lawful credits, for the purpose of increasing the amount of the lien, is a fraud in law, which vitiates the entire lien as against the title of an assignee of the premises.

8. *Error without injury in charge given.*—The giving of an erroneous charge is not regarded as error without injury, unless, on the evidence disclosed by the record, the court might have given a general affirmative charge in favor of the appellee.



[Lane &amp; Bodley Co. v. Jones.]

APPEAL from the City Court of Mobile.

Tried before the Hon. O. J. SEMMES.

This action was brought by the Lane & Bodley Company, a corporation created under the laws of Ohio, against the Danner Land & Lumber Company, a domestic corporation, the Bank of Mobile, and Winston Jones, as assignee of said bank; and was commenced on the 6th January, 1885. The complaint contained but a single count, in which the plaintiff claimed \$832.34 of the Danner Land & Lumber Company, "as due by account verified by affidavit on, to-wit, the 28th June, 1884, for materials, fixtures and machinery furnished by plaintiff, as original contractor, at request of said defendant, for the buildings and improvements known as the Danner Land & Lumber Company's planing-mill in the port of Mobile, on the lot of land being the squares in which the buildings known as Hitchcock's press are situated, said square being bounded," &c.; "together with the wharf and water privileges in front of said square, extending eastwardly," &c. The complaint alleged that a just and true account of the demand due plaintiff by said defendant, after all just credits have been given, and a true description of the property sought to be charged, had been filed in the office of the judge of probate of Mobile, verified by the oath of the plaintiff's agent, on the 20th December, 1884, within six months after the indebtedness accrued; that the Danner Land & Lumber Company, after the commencement of the lien claimed, conveyed the property to the Bank of Mobile, who afterwards, in July, 1884, conveyed all its property, by deed of assignment for the benefit of creditors, to Winston Jones; and asked a personal judgment against said Land & Lumber Company, and the enforcement of a statutory lien upon the property described, "to the extent allowed by law."

No defense was made by the Danner Land & Lumber Company, or the Bank of Mobile, and judgment by default was entered against each of them, with writ of inquiry; but the writ of inquiry was never executed as against the bank. The defendant Jones filed several pleas, the first of which was a denial of the plaintiff's asserted lien; the second, third and fourth related to the location and proper description of the property on which the planing-mill was situated; and the fifth alleged that the plaintiff, prior to the commencement of the suit, "claimed and undertook to rely solely on the personal credit of the Danner Land & Lumber Company for the payment of said debt." The court sustained demurrers to the second, third and fourth pleas, and the cause was tried on issue joined on the others, resulting in a verdict against the plaintiff's claim of lien.

On the trial, a bill of exceptions was reserved by the plaintiff,

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but it does not purport to set out all the evidence adduced. The plaintiff offered in evidence the statement of claim filed for record, with its verification, in which the property was described as in the complaint; and proved that the several articles specified "were furnished and delivered in pursuance of a single continuing contract, the last items being shipped from Cincinnati on the 28th June, 1884, and delivered at said planing-mill in Mobile at or about the 10th July, 1884." The defendant introduced as evidence the several invoices for the materials furnished by plaintiff, at different dates, between April 28th and June 28th, 1884, and several notes which the Danner Land & Lumber Company had executed to plaintiff for its indebtedness at their respective dates. The last note was for \$1,837.04, dated September 8th, 1884, and payable six months after date. It appeared, also, that said defendant owned several mills, for which materials were furnished by plaintiff; that the items for the different mills were not kept separate, and several partial payments on the general indebtedness had been made. The defendant proved, also, that these notes had been filed by plaintiff, as claims against the Danner Land & Lumber Company, in the suit of James McPhillips and others against said Winston Jones (reported in 77 Ala. 314), and that plaintiff had received \$930 as a dividend on them in that suit; and the plaintiff proved, in rebuttal, that this sum had been entered as a credit on plaintiff's account for materials furnished for other mills, another claim filed in said suit. The defendant proved, also, that some of the materials included in the invoices had been returned to plaintiff; but, of these articles, those intended for the different mills were not distinguished, and plaintiff denied notice of their return. The court charged the jury, on the request of the defendant, "that if they believed, from the evidence, that any material portion of the account sued on was embraced in a note which extends the time of payment beyond the day this suit was brought, January 6th, 1885, they must find there is no lien." The plaintiff excepted to this charge, and requested the court to instruct the jury, "that if they find that plaintiff surrendered the notes before they became due, then the fact that the notes were made payable after the time for filing the claim with the probate judge does not, of itself, operate as a waiver of the lien." The court refused to give this charge, and the plaintiff excepted to its refusal.

The charge given, the refusal of the charge asked, and several rulings on the evidence, are now assigned as error.

F. G. BROMBERG, for the appellant.—(1.) If any question as to the sufficiency of the complaint, or of the claim filed for

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record, in the description of the premises sought to be charged with a lien, is here presented for review, it is submitted that the particular lot, on which the planing-mill is situated, is described with requisite certainty and distinctness, and that the residue of the description is surplusage. (2.) The lien was not waived by the acceptance of the debtor's notes on settlement of accounts.—Phil. Mech. Liens, § 276, 2d ed. (3.) The notes were filed in the Chancery Court, and virtually surrendered; and the plaintiff was seeking to enforce its lien in the only form in which it could be pursued, by leave of that court. (4.) The record presents no question as to the time within which plaintiff's claim of lien should be filed; but, if so presented, it is insisted that plaintiff was an original contractor, and was allowed six months for filing claims.—Code, § 3444; *Geiger v. Hussey*, 63 Ala. 338; *Welch v. Porter*, 63 Ala. 225; *Rothe v. Bellingrath*, 71 Ala. 58; Phil. Mech. Liens, § 40. (5.) The principal defendant having suffered judgment by default, no question can be raised as to the premature commencement of the action because the last note had not matured; nor was any such question raised in the court below.

GAYLORD B. CLARK & F. B. CLARK, Jr., and with them PILLANS, TORREY & HANAW, *contra*.—(1.) If plaintiff ever had a lien on the particular property sought to be charged, it was waived by the acceptance of the debtor's notes, in which the day of payment was extended beyond the expiration of the statutory limitation for the enforcement of the lien. Phillips on Mechanic's Liens, §§ 272–3, 281–2. (2.) But no lien was ever created, because the evidence shows that materials were furnished, from time to time, under a general running account, for several mills; and there is no proof of the particular items furnished for any one mill. (3.) The failure to give credit for proper partial payments, in the claim filed, is fatal to it.—Phil. Mech. Liens, §§ 287, 377; *Hoffman v. Walton*, 36 Mo. 613; *Geiger v. Hussey*, 63 Ala. 342. (4.) The plaintiff never can recover, under the facts set out in the record; and therefore any erroneous ruling is not cause of reversal. The claim is filed for a lien on two lots, neither of which is described so that the "one acre" can be identified on which the mill is located; and it was not filed until after the expiration of four months, the statutory limitation upon all except original contractors. That the plaintiff is not an original contractor, see the language of the statute, sections 3444, 3357–9, 3461; also, *Duff v. Hoffman*, 63 Penn. St. 191; *Winder v. Caldwell*, 14 How. 434; Phil. Mech. Liens, §§ 41–50. That the description of the property sought to be charged is fatally defective, see *Lemley v. Iron & Steel Co.*, 65 Mo. 545; *Fitzpatrick v. Thomas*, 61 Mo. 512; Phil. Mech. Liens, § 376.



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CLOPTON, J.—The statute gives a lien to every mechanic, or other person, who shall furnish any materials, fixtures, engine, boiler or machinery, for any building, erection, or improvement upon land, or for repairing the same, under and by virtue of a contract with the owner or proprietor thereof, upon such building, erection, or improvement, and upon the lot upon which the same is situated, if in any town, city or village. The lien may be lost or defeated by non-compliance with the subsequent provisions of the statutes. To complete the lien, the claimant, if an original contractor, must, within six months after the indebtedness has accrued, file with the judge of probate, of the county in which the property is located, a just and true account of the demand due him, after all just credits have been given, with a description of the property, or so near as to identify the same, on which the lien is intended to apply, and the name of the owner, which statement must be verified; and must commence suit within ninety days after filing the lien. Code, 1876, §§ 3440, 3444, 3454.

It appears from the record that the plaintiffs furnished materials for a planing-mill, erected on the land described in the complaint, under a contract with the owner thereof. They are, in the meaning of the statute, material-men, and original contractors.—*Geiger v. Hussey*, 63 Ala. 342.

It is objected, that no lien attaches, because, as alleged in the statement filed, and as set forth in the complaint, the plaintiffs claim a lien on two distinct lots, for materials for a mill erected only on one of them. The ground of the objection is, that a lien is asserted on the lot, on which the mill is erected, and on the wharf and water privileges in front. The contention is not supported by the statement as filed, or as alleged in the complaint. If it were conceded that a lien was claimed on two lots, the statement and complaint show on what lot the mill is erected, and describe it with reasonable certainty. The claim of a lien on the wharf and water privileges, to which no lien attaches, does not vitiate the lien on the lot, on which the mill is located, the same being sufficiently described.—*Bedsole v. Peters*, at present term; *ante*, 133.

The material questions are, did the plaintiffs take the necessary steps to complete the lien? or have they waived it by their conduct and dealings? The undisputed facts are: The Danner Land and Lumber Company owned and operated several mills in the counties of Mobile and Baldwin; the plaintiffs furnished materials for all the mills, and kept a current account, including all the items furnished for all the mills, according to the dates of delivery, which commenced in October, 1883, and continued until June 28, 1884. At stated dates, the company executed to the plaintiffs four several notes of

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different amounts, bearing different dates, and maturing at different times, which were entered as credits on the account. The notes, in the aggregate, covered the amount of the current account, at the time the last note was given, except a small balance. The notes were given without reference to the mill for which any particular items were furnished. The last note bears date September 8, 1884, and is payable six months after date. The notes were given for the amounts due for materials furnished for the different mills indiscriminately, so that it is impossible to tell what particular items entered into any particular note. On December 20, 1884, a verified statement was filed in the office of the judge of probate, and the suit was commenced January 6, 1885.

Generally, the acceptance of the note of a debtor is not, *prima facie*, payment of an antecedent debt. To operate an extinguishment of the original indebtedness, the note must, by agreement of the parties, express or implied, be received in payment. A contractor may accept, in consideration of the materials furnished, the note of the owner or proprietor of the land, as a convenient mode of liquidating the account, without waiving the lien. The original indebtedness is not thereby extinguished, but the right of action is suspended until the maturity of the note. After maturity, the note being unpaid, he may bring suit on the original indebtedness, and surrender the note. If the notes were not received in payment, and matured before the expiration of the time within which suit must be commenced, the statutory lien is not thereby waived or defeated, the statutory requirements having otherwise been complied with.—*McMurray v. Taylor*, 30 Mo. 263; *Miller v. Moore*, 1 E. D. Smith, 739. The plaintiffs had ninety days after filing the lien within which to commence suit, and all the notes matured before the expiration of the time. The charge given at the request of defendants asserts the legal proposition, that there is no lien, if any material portion of the account was embraced in a note, which extends the time of payment beyond the day on which the suit was actually brought, though the extension is not beyond the time in which suit must, under the statute, be commenced. The legal effect of the mere acceptance of the notes is to postpone the time of bringing the action, and does not defeat or waive the lien, unless by the time of extension the plaintiffs disable themselves to commence suit within the time prescribed by the statute.—*Steamboat Charlotte v. Hammond*, 9 Mo. 58; Phillips on Mec. Liens, § 282.

But, when a note is taken, which does not extend the credit beyond the time in which suit must be commenced to complete the lien, though received as conditional payment, the

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contractor can not maintain an action, to enforce the lien, on the original indebtedness, without producing and surrendering the note at the trial, or satisfactorily accounting for its absence. The policy of the law is to guard the owner or proprietor against a double liability by reason of its assignment to an innocent holder, especially when the note is commercial paper. *Mooring v. Mo. M. D. & M. Ins. Co.*, 27 Ala. 254; Phillips on Mec. Liens, § 277; 2 Benj. on Sales, § 1084. The notes were filed in the office of the register in chancery, after the commencement of this action, as evidences of a valid and subsisting indebtedness due by the Danner Land and Lumber Company, in a suit pending in the Chancery Court, wherein the assets of the company are being marshalled. At the same time, the plaintiffs claimed a lien on lands of the company for materials furnished the several mills, and filed an account showing the amount of materials furnished each mill. The plaintiffs have received a dividend of \$903.90, being fifteen per cent. on the aggregate sum of \$6,026.05. The notes were not produced at the trial, nor was there any offer to surrender them. The use made of the notes, the reception of the dividend, and suffering them to remain on file, are incompatible with their surrender. The charge requested by the plaintiffs is abstract, there being no evidence tending to show a surrender of the notes, and was properly refused. Whether the plaintiffs, under the circumstances, have placed themselves in a position so that they can not surrender the notes as required by law, is a question not raised in the trial court, and which we do not decide.

On July 4, 1884, the Danner Land and Lumber Company conveyed the land in controversy to the Bank of Mobile, and thereafter, during the same month, the Bank of Mobile executed a general assignment of all its property to Jones, for the benefit of its creditors. The real controversy, as respects the lien, is between the plaintiffs and Jones, as assignee. It is insisted that the judgment should be affirmed, though there may be error in the rulings of the court. In order to perfect a lien, which shall override subsequent incumbrances, the contractor must, within six months after the indebtedness has accrued, file with the judge of probate a just and true account of the demand due him, after all just credits have been given. The bill of exceptions states, that evidence was introduced tending to show that the materials were furnished under "a single continuing contract," while the invoices indicate that they were furnished under different contracts, evidenced by separate and distinct orders. If the materials were furnished in pursuance of a single continuing contract, such as to furnish materials for a building about to be erected, or in pro-



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cess of construction, the period within which the statement must be filed with the judge of probate commences to run from the delivery of the last items. But, if the materials were furnished under separate orders or requests, in pursuance of a general agreement or understanding to furnish such materials as may be needed, from time to time, for repairing or replacing machinery in the mill, and as ordered, then each order or request is a separate contract, and the statement must be filed within the time limited after delivery upon each order. In such case, no lien attaches for any materials furnished exceeding six months prior to the filing of the statement. *Livermore v. Wright*, 33 Mo. 31; Phillips on Mec. Liens, § 324. Although, on admitted or uncontroverted facts, whether the materials were delivered under one or several contracts, would be a question of law, where the facts are disputed, the question is for the determination of the jury.

It appears that cash payments were made at different times, amounting in the aggregate to nearly one-third of the entire account, and were entered as general credits on the account current for materials furnished for all the mills, without special appropriation to the indebtedness for materials delivered for any particular mill. When the plaintiffs filed the account for a lien for materials furnished the planing-mill, no portion of these payments were given as credits. When neither the debtor nor creditor makes a special appropriation of the payments at the time they are made, but they are entered as general credits on the general account, the creditor is without right to make a special application thereafter to any special part of the account, to serve his interests, as may be subsequently developed. A *pro-rata* portion of the payments should have been given as credits on the account filed for a lien on the planing-mill. The omission to give such credits was not filing "a just and true account," as required by the statutes; and if intentionally omitted, for the purpose of increasing the amount of the lien on the planing-mill, such omission would be a fraud in law, and would vitiate the entire lien as against the title of Jones.—*Hoffman v. Walton*, 36 Mo. 613; *McWilliams v. Allen*, 45 Mo. 573. The dividend received should also be apportioned.

As the evidence is not clear and satisfactory in respect to the contract, and as the subsequent appropriation of payments may be subject to explanation, we can not concur in the proposition of counsel for appellee, that the judgment should be affirmed, though the charge requested by defendants is erroneous. An erroneous ruling or instruction is not regarded as error without injury, unless, on the evidence disclosed by the record, the court would be justified in giving the affirmative

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charge in favor of the appellee.—*Donley v. Camp*, 22 Ala. 659; *Baker v. Barclift*, 76 Ala. 414.

We discover no error in the record, other than the one mentioned.

Reversed and remanded.

## Thornton v. Strauss & Steinhardt.

### *Action for Money Had and Received.*

1. *When action lies in favor of landlord.*—A landlord, having a statutory lien on his tenant's crop for the rent of the land, may maintain an action for money had and received, against a purchaser who, having notice of the lien, receives and sells the crop.

2. *Agreement to pay rent, in default of paying purchase-money.*—Where lands have been sold and conveyed, a mortgage being taken to secure the balance of the purchase-money unpaid, a subsequent agreement between the parties, reduced to writing, by which the purchasers bind themselves, in the event of their failure to pay the balance of the purchase-money as stipulated, to deliver three bales of cotton as rent, creates the relation of landlord and tenant between them, with its attendant rights and incidents.

3. *Assignment of mortgage and purchaser's note, after maturity of rent-obligation.*—An assignment by the vendor, after the maturity of the purchaser's obligation to pay rent, of the mortgage and secured note for the unpaid purchase-money, does not carry with it, as an incident, the right to the rent then past-due, nor take away the vendor's right of action as landlord; but, if it were shown that the purchase-money had been paid in full to the assignee, under a redemption or foreclosure of the mortgage, this would be a complete defense to a subsequent action by the vendor, founded on the rent-contract, or on his lien as landlord.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by S. H. Thornton, against Strauss & Steinhardt as partners, and was commenced on the 19th March, 1884. The complaint contained but a single count, which claimed \$150 as money had and received. The only plea was the general issue. On all the evidence adduced on the trial, which is set out in the bill of exceptions, and also substantially in the opinion of this court, the court charged the jury, that they must find for the defendants, if they believed the evidence. The plaintiff excepted to this charge, and he here assigns it as error.

GAMBLE & RICHARDSON, for the appellant.

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L. M. LANE, *contra*.

STONE, C. J.—S. H. Thornton, on the eighth day of January, 1880, sold and conveyed a tract of land to Allen and William Baugh, receiving four hundred dollars of the purchase-money in cash, and taking their interest-bearing notes for the balance—five hundred dollars, due first of October, 1880, and three hundred due first of October, 1881; and there was a provision that, in the event the note first to fall due was not paid in full at maturity, then the whole of the purchase-money should be due and demandable. Contemporaneously with the execution of the deed, the Baughs reconveyed the lands to Thornton by mortgage deed, with customary defeasance on payment of the purchase-money notes in full. The mortgage contains no stipulation as to possession of the lands in the mortgagors, but they went into possession, and occupied during the year 1880. The note due October 1, 1880, was not paid. On the 11th January, 1881, the Baughs executed an agreement in the following terms: "We, William and Allen Baugh, do hereby agree and bind ourselves to pay S. H. Thornton, or order, three bales of cotton, to weigh 500 lbs. each, on or before the first day of October next; the consideration being that, in case we fail to make the payment on the tract of land bought of him, then these three bales are to be paid and delivered as rent." This agreement was written and attested by Steinhardt, one of the appellees.

The Baughs executed a mortgage of their crop to be grown in 1881, to Strauss & Steinhardt; but whether this was before or after the execution of the rent contract copied above, the record does not inform us. They made more than three bales of cotton that year, which were delivered to Strauss & Steinhardt, sold by them, and the money retained. They, Strauss & Steinhardt, had knowledge that the said rent contract had been entered into, and that neither the rent nor the purchase-money of the lands had been paid. The present action for money had and received was brought by Thornton, to recover the proceeds of three of the bales of cotton, on which he alleges he had a paramount lien for the rent due him. If his alleged lien on the cotton be maintainable, he has chosen the correct remedy. *Thompson v. Merriman*, 15 Ala. 166; *Westmoreland v. Foster*, 60 Ala. 448.

The instrument copied above is valid as a rent contract; and if the Baughs failed to pay the purchase-money, as the record recites they did, it creates a *prima facie* right in Thornton to demand rent.—*Collins v. Wigham*, 58 Ala. 438; *Wilkinson v. Roper*, 74 Ala. 140. The recitals in the bill of exceptions, stated as facts, show clearly that, at the time the rent contract



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was executed, Thornton had the right to demand and recover the possession of the mortgaged premises. The legal title was in him, while the Baughs owned but an equity, which was valuable to them only as a basis of a right to redeem.—*Welsh v. Phillips*, 54 Ala. 314; *Toomer v. Randolph*, 60 Ala. 356; *Slaughter v. Swift*, 67 Ala. 494; *Farris v. Houston*, 74 Ala. 162; *Garland v. Watson*, *Ib.* 323; *Coffey v. Hunt*, 75 Ala. 236; *Kelly v. Longshore*, 78 Ala. 203. By executing the rent obligation, the Baughs acknowledged Thornton's right to the possession, and they thereby became his tenants, with all the rights of landlord and tenant subsisting between them. This has the same legal effect, as if Thornton had first evicted them, and then leased the premises to them; and his right to lease to them was as clear, as if they had never contracted to purchase. This is the rule at law, and we are dealing only with legal rights. We have thus shown that, on the facts so far considered, the present case presents the simple right of a landlord to recover for rents promised by the tenant.

On the 21st October, 1881, Thornton, the mortgagee, conveyed his interest in the notes and mortgage given by the Baughs, by an indorsement on the mortgage, in the following language: "For value received, I hereby transfer all my title, interest, claim and demand, to the within notes and mortgage, to James A. Harris, his heirs and assigns, with all its rights, privileges and immunities. Witness my hand and seal, this 21st day of October, 1881;" signed, "S. H. THORNTON, mortgagee." This was after the rent contract became due, but long before this suit was brought. So far as the indorsement may be considered as an attempt or agreement to convey the title to the land, it is very clear that it did not carry with it, as an incident, any right to the rent then past due.—*English v. Key*, 39 Ala. 113; *Tubb v. Fort*, 58 Ala. 277; *Coffey v. Hunt*, 75 Ala. 236. It is contended, however, that inasmuch as rents paid under this contract would become part payment of the purchase-money, in any attempt to foreclose the mortgage, or to redeem under it, Thornton should not be permitted to collect it, after having assigned and transferred all his interest in the purchase-money notes, and the mortgage given to secure their payment. The argument is, that to allow such collection, would be to leave the Baughs and the mortgaged land liable to Harris for the whole of the purchase-money, notwithstanding this payment of the value of three bales of cotton.

Three or four years have elapsed since the notes and mortgage were assigned to Harris, and the record furnishes no information whether the purchase-money debts have been paid, the mortgage foreclosed, resulting in full collection, or that a redemption of the mortgaged property on full payment has

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been perfected. If either of these possible categories exists, then neither the Baughs, nor any one having their property, ought to be required to pay the rent. To allow such collection, would be to force double payment. Such supposed fact shown, would be a complete defense to this suit.

But, suppose neither of these categories is true. There is no question that the Baughs owe the three bales of cotton as rent, and that that debt, according to the recitals in the bill of exceptions, has a lien on the crop grown on the lands in 1881, paramount to the claim of Strauss & Steinhardt. The latter have tortiously converted to their own use cotton known to rest under a paramount lien; and their defense is, not that they are not liable to some one, but that there is an outstanding right in a third person. Thornton had and has evidence of right and ownership, which establishes in him a *prima facie* right of recovery; Strauss & Steinhardt had knowledge of his paramount right, and tortiously converted the property to their own use; and when Thornton sues to recover the proceeds, they attempt to defend on the outstanding title of a third person, with which they do not connect themselves. This the law will not permit.

The Circuit Court erred in its charge to the jury.

Reversed and remanded.

## Richardson v. Dunn.

### *Bill in Equity by Judgment Debtor, for Redemption of Land sold under Execution.*

1. *Bill to redeem; averment as to delivery of possession to purchaser.* When lands sold under execution are, at the time of the sale, in the possession of a tenant, to whom notice is given by the purchaser, and from whom he afterwards collects rents (Code, § 2878); these facts being averred in a bill to redeem by the judgment debtor, it is unnecessary that he should also aver that he delivered possession to the purchaser within ten days after the sale.

2. *Same; entire or partial redemption.*—Where several lots are included in one sale under execution, and the defendant has no title to one of them, he may maintain a bill to redeem the others, averring his want of title to the omitted lot, and tendering the entire amount due, without any deduction on account of it.

3. *Same; what are "lawful charges" to be tendered.*—The "lawful charges" which the judgment debtor, seeking to redeem, is required to pay or tender (Code, § 2879), include only claims and demands which are in the nature of a lien or incumbrance on the land; and neither insurance on buildings paid by the purchaser, nor a judgment rendered by a jus-

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tice of the peace, unless an execution thereon has been levied on the land, is embraced in such lawful charges.

4. *Same; tender of conveyance to be executed by purchaser.*—If an averment of a tender of a conveyance, to be executed by the purchaser, be necessary to the equity of a bill to redeem in any case, an averment that the defendant denies the complainant's right to redeem dispenses with its necessity, since it shows that such tender would be nugatory.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 29th September, 1885, by Mark W. Dunn, against William E. Richardson; and sought to redeem certain lots of land in Mobile, which had been sold under execution against the complainant, and purchased by the defendant. The sale was made on the first Monday in January, 1885, under a judgment for \$131.21, besides costs, in favor of Bernard Moog, the defendant becoming the purchaser, at the price of \$165, and receiving the sheriff's deed. The lands sold consisted of four lots within the corporate limits of the city of Mobile, and a parcel of land containing about five acres, which was situated about eight miles distant from the city; and all these were sold, as the bill alleged, "in a lump." It was further alleged that one of the lots included in the sale was vacant, and the complainant had no title whatever to it, it having been conveyed to his deceased father by mistake; that the other lots were occupied by tenants at the time of the sale, who were paying monthly rents to the complainant; that the defendant notified these tenants of his purchase, and required them to pay rent to him, and collected rents from them, "and has ever since been in possession of said property;" that on the 11th September, 1885, complainant tendered to said Richardson the sum of \$345.04, the amount due on a redemption of the property, but Richardson "refused to receive the same, and refused to make any reconveyance of said property to him, and denied his right to redeem at all, and still holds possession of said property, collecting the rents." A list of the items making the sum tendered, \$345.04, was made an exhibit to the bill; and also a copy of the account furnished by the defendant, which aggregated \$625.85. Each of these accounts included a judgment for \$98.50, in favor of L. Brewer & Co., which the defendant claimed to have bought; but the bill alleged that the judgment was rendered by a justice of the peace, and that no execution on it had ever been levied on the lands. The account furnished by the defendant also included items of about \$50, insurance paid on the houses, and \$275 paid for a new house erected on the vacant lot; and the complainant denied that these were lawful charges.

The defendant demurred to the bill, and also moved to dis-

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miss it for want of equity, assigning as grounds of demurrer—1st, that it did not allege that the complainant delivered the possession of the property to the defendant, or that defendant consented that he might retain the possession; 2d, that it showed on its face complainant's refusal to pay for the improvements and insurance premiums paid; 3d, that it sought to redeem only a portion of the property sold, and showed that the complainant himself still retained the possession of the five acres of land in the country; 4th, that it did not aver a tender of a conveyance to be executed. The chancellor overruled the motion and the demurrers, and his decree is now assigned as error.

McINTOSH & RICH, and W. E. RICHARDSON, for appellant. A delivery of possession to the purchaser, within ten days after the sale, is a condition precedent to the judgment debtor's right of redemption; and such delivery of possession must be averred in the bill, else it is wanting in equity.—Code, § 2878; *Stocks v. Young*, 67 Ala. 341; *Sanford v. Ochlatomi*, 23 Ala. 669; *Paulling v. Meade*, 23 Ala. 505. The fact that a part of the land is in the possession of tenants, from whom the purchaser afterwards collected rents, can not dispense with a strict compliance with this statutory requirement; for the possession must be delivered within ten days after the sale, and the notice to the tenants, whereby the purchaser may perfect his right against them, can not be given until after the expiration of ten days. If the fact of tenancy can avoid the statutory requisition in any case, it can not have that effect here, where only the city lots were in the possession of tenants; the five acres in the country being in the possession of the complainant himself, or not shown to be in the possession of tenants. The right of redemption is entire, and it can not be enforced as to a part of the property sold. If the complainant has perfected his right of redemption, he has an adequate remedy at law.—*Johnson v. Nabring*, 50 Ala. 396.

OVERALL & BESTOR, *contra*.—A delivery of possession to the purchaser is only necessary when the defendant himself is in possession at the time of the sale; if the land is in the possession of tenants, the statute gives the purchaser a remedy against them.—Code, § 2878.

The sum tendered by the complainant embraced all the lawful charges.—*Palmer v. Palmer*, 74 Ala. 289; *Gregg v. Banks*, 59 Ala. 317; *Couthway v. Berghaus*, 25 Ala. 393. The alleged denial of the right to redeem waived the necessity for any tender at all.—17 Ala. 502; 29 Ala. 298; 74 Ala. 288. The defendant is left in possession of the vacant lot, on which he has

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erected his improvements, and which does not belong to the complainant; and he certainly can not complain of this.

SOMERVILLE, J.—If we admit the principle, that where the lands of a judgment debtor have been sold under execution, and he files a bill to redeem under the provisions of the statute, the bill is wanting in equity, where it shows that he has continued in the actual possession of the lands, without offering to surrender such possession to the purchaser within ten days after the sale, unless by consent of such purchaser; this can not be the rule, where the lands are shown to be in the possession of a tenant. The statute expressly provides for a case like this, in the following language. After declaring that “the possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, *if in his possession*, on demand of the purchaser, or his vendee,” it is added: “If the land is in the possession of a tenant, *notice* to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, *vests the right* to the possession in him, *in the same manner as if such tenant had attorned to him.*”—Code, 1876, § 2878. The legal effect of such notice, when given, is to constitute the tenant in possession the tenant of the purchaser, and thereby to abrogate his fealty to the former owner, transfer his possession to the purchaser, and substitute the latter as his future landlord, with the ordinary rights growing out of this relationship.—*Comer v. Sheehan*, 74 Ala. 452, 458. The bill avers the facts, that the land sought to be redeemed was in the possession of tenants; that the defendant had given the statutory notice to them, and had since that time been collecting the rents without molestation. This was a sufficient averment of a transfer of the possession of the lands to the defendant, and an offer to surrender under such circumstances was more than nugatory.

The bill, it is true, does not offer to redeem one of the lots, which was supposed to have been sold by the sheriff under the execution; and objection is taken to this, by demurrer. It is averred, however, that the complainant never had any title or interest in this lot, and therefore none was purchased by the defendant which he could redeem. The facts are stated which show this to be true. No deduction from the amount of the purchase-money is asked on this account, but the tender made was for the whole amount bid, with ten per cent. *per annum*, and other lawful charges. This objection is clearly without merit.

The amount paid by the defendant for insurance against fire was not a lawful charge for which he was entitled to reimbursement. Nor was the amount of the justice's judgment purchased

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by him from Brewer & Co., unless execution had been issued on it, and levied on the lands, so as to constitute a lien on them. The phrase "lawful charges," as used in the statute, has been construed not to include any claim or demand held by the purchaser, except such as may be in the nature of a lien or incumbrance on the land.—*Parmer v. Parmer*, 74 Ala. 284, 289, and cases there cited.

If it be true that the complainant should have prepared and tendered a deed of conveyance to the defendant, for his signature, and that, in ordinary cases, this fact must be averred in a bill to redeem, in order to give it equity; it may be answered, that the bill avers a denial on the part of the defendant of complainant's right to redeem in any event, and this would be a sufficient and valid excuse for failing to prepare and tender such deed, which, it must be presumed, would have been entirely fruitless.

The decree of the chancellor, overruling the demurrer, and refusing to dismiss the bill for want of equity, is free from error, and must be affirmed.

## Levy & Co. v. Williams.\*

### *Creditors' Bill in Equity to set aside Fraudulent Conveyances.*

1. *Sale by insolvent debtor to creditor; validity as against other creditors.* A failing or insolvent debtor may sell a part, or the whole of his property, in payment of an antecedent debt, to the exclusion of his other creditors; and if the debt is *bona fide*, its amount not materially less than the value of the property, and no use or benefit is reserved or secured to the debtor, the transaction will be sustained, without regard to any attendant circumstances or badges of fraud, the intentions of the debtor himself, or notice of his intentions on the part of the purchasing creditor.

2. *Same.*—The purchasing creditor can not go beyond the permissible purpose of securing the payment of his own debt, and, in effecting this purpose, must not unnecessarily hinder or delay other creditors, or impair their rights, by placing it in the power of the debtor to effectually screen a part of the proceeds of sale, when he has knowledge of facts sufficient to create a reasonable belief of such intention; and when his purchase is made partly in payment of an antecedent debt, and partly for money paid, the same rule is applicable as to purchasers on a new consideration, and the payment of the past debt is a circumstance to be considered in determining the good faith of the transaction.

3. *Same.*—Although the purchase may exceed the amount of the purchaser's debt, the fact of such excess does not invalidate the trans-

\* This case was decided in April, 1885, but the opinion was mislaid for some time.  
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action, when reasonably necessary for attaining the lawful purpose of satisfying the debt; but this means, not a necessity created by the debtor's unyielding demand for cash, but a reasonable necessity arising from the nature, situation, or condition of the property.

4. *Same; as applied to this case.*—In this case, the evidence establishing the insolvency of the debtor at the time the sale was made, and his fraudulent intent to convert his lands into money, not for the payment of his debts, but for the avowed purpose of procuring family supplies and enabling him to carry on his business, the purchasing creditors having knowledge of his embarrassed condition, and notice of facts sufficient to charge them with knowledge of such fraudulent intent; *held*, that their purchase of three tracts of land, at the aggregate price of \$1,000, of which amount \$600 was paid in cash, and the balance in satisfaction of the creditor's antecedent debt, was fraudulent as against other creditors, although the debtor refused to sell any one parcel of the land separately.

5. *Exemptions to partners.*—Partners can not claim an individual exemption in the partnership property, during the continuance of the partnership; but, when one partner sells out his interest to the other, without reservation, the effects become the exclusive property of the purchaser, discharged from any lien on account of partnership debts, and he may claim an exemption in them, as against the partnership creditors, if the sale was fair and *bona fide*.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed on the 1st of July, 1881, by M. P. Levy & Co., Leinkauff & Strauss, and other mercantile partnerships doing business in Mobile, as creditors of Edward Williams and W. L. Brasfield, and of the partnership of Williams & Brasfield, who carried on a mercantile business at Jefferson, in Marengo county; against said Williams and Brasfield, individually and as late partners, and against Newhouse Brothers, Wollner, Hirschberg & Co., and L. J. Pace; and sought to set aside certain sales and conveyances of property made by said Williams and Brasfield, individually and as partners, to their co-defendants, on the ground of fraud, and to have the property conveyed condemned and sold for the satisfaction of the debts due to the complainants respectively; also, for a discovery and account, and to set aside a claim of exemption made by Williams in and to property which, as alleged, had belonged to said partnership of Williams & Brasfield.

The complainants' debts aggregated nearly \$5,000, and were contracted for goods sold and delivered by them respectively, prior to March, 1881, to said Williams & Brasfield. The conveyances sought to be set aside were these: (1.) A deed executed by said Williams and wife, dated March 26th, 1881, by which they conveyed to Newhouse Brothers, in consideration, as recited, of \$800 in hand paid, two tracts of land, one containing 280 acres, and the other 160 acres. (2.) A deed executed by said Williams and Brasfield, describing themselves as late partners, and their wives joining with them, dated also

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the 26th March, 1881, by which they conveyed to Newhouse Brothers, in consideration, as recited, of \$200 in hand paid, a tract of land containing 160 acres. (3.) A deed executed by said Williams and wife, dated March 28th, 1881, by which they conveyed to Wollner, Hirschberg & Co., in consideration, as recited, of \$1,220.77 in hand paid, an undivided half interest in a tract of land containing 1,100 acres, and two smaller tracts, together containing 420 acres, on which there was a prior mortgage to Agnew, Scales & Co. (4.) A sale and assignment by said Williams to Wollner, Hirschberg & Co. of a stock of goods, with notes and accounts, on the consideration, as recited, of \$450.59 in hand paid, which was also dated the 28th March, 1881. (5.) An assignment of notes and accounts by said Williams to L. J. Pace, which was dated the 28th March, 1881, and recited the payment of \$150 as its consideration. (6.) A declaration and claim of exemption, made by said Williams on the 28th March, 1881, duly verified by affidavit; the property claimed consisting of mules, horses, &c., aggregating \$1,000 in value. The bill alleged that, at the time these several conveyances were executed, the said Williams and Brasfield were insolvent, and were known by the several grantees to be insolvent; that Williams, a few days before the 26th March, 1881, submitted "a written proposition of compromise to his creditors in Mobile, with schedules of his debts and property; that said several conveyances were executed, while negotiations were pending with said creditors, for the purpose of hindering, delaying and defrauding them; that the grantees had knowledge of the insolvency of said Williams & Brasfield, and of their fraudulent intent. It was alleged, also, that the firm of Williams & Brasfield was not dissolved on the 26th March, 1881, or, if dissolved, no notice of the dissolution had been published, or given to the complainants; and that the property claimed as exempt by Williams belonged to the partnership.

Answers were filed by the several defendants, denying the charges of fraud, asserting the validity of their respective conveyances, and stating, in answer to interrogatories, the consideration of each, the value of the property conveyed, &c. Williams asserted, also, that his partnership with Brasfield was dissolved some time before the several conveyances were executed, he buying out the interest of Brasfield, and assuming the debts; and he alleged that the property claimed by him as exempt was his individual property. After the filing of the bill, he made a new declaration and claim of exemption, specifying the same property as before.

On final hearing, on pleadings and proof, the chancellor held and decreed as follows: (1.) "That the conveyances made by Williams to Newhouse Brothers were not made to hinder, de-

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lay or defraud the creditors of said Williams, or of Williams & Brasfield, but were made *bona fide*, and for a valuable consideration, the property sold at a price approximating the value thereof; and said sale and conveyances are sustained." (2.) "That the several sales and conveyances made by said Williams to Wollner, Hirschberg & Co. were made by him in good faith, and were not made to hinder, delay or defraud the creditors of said Williams, or of Williams & Brasfield, but were made to pay the indebtedness of said Williams & Brasfield to said firm; the price for which the property sold was not grossly inadequate to the true value thereof, and said sales and conveyances are confirmed." (3.) "That the complainants have a complete and adequate remedy at law to contest said Williams' claim of exemption, and this court has no jurisdiction to try the same." (4.) "That the sale of the notes, accounts and mortgages, made by said Williams to L. J. Pace, as charged in the bill, was fraudulent and void as to the complainants, and complainants are entitled to subject the same to their demands."

The complainants appealed from this decree, and here assigned each part of it as error, except as to the conveyance to Pace.

OVERALL & BESTOR, and JAMES E. WEBB, for the appellants. The intent with which an act is done, in any case, can only be proved by circumstances; and when a fraudulent intent is to be proved, a greater difficulty is encountered, on account of the secrecy and care with which the parties guard their actions. But certain general rules have been laid down, by which the question of fraudulent intent is to be determined, and certain badges of fraud clearly established. A man is presumed to intend the necessary consequences of his acts.—Bump on Fraud. Conv., 25; *Pope v. Wilson*, 7 Ala. 690; *Gazzam v. Poyntz*, 4 Ala. 374; *Lehman, Durr & Co. v. Kelly*, 68 Ala. 200. Wollner and Newhouse were brothers-in-laws, Wollner was a cousin to Pace, and Pace was a cousin to Williams; and while this relationship does not, of itself, render any conveyance fraudulent or void, it is a circumstance which will be considered, with others, in determining the good faith of all the transactions among them, by which Newhouse and Wollner obtained property more than sufficient to pay their debts, Williams obtained \$600 in money, and was employed by Pace as his clerk in selling the goods. At the time these several transactions were consummated, negotiations were pending between Williams and his creditors, for a compromise and settlement of his indebtedness; and Wollner, Hirschberg & Co. were parties to the negotiations, by which an extension of time was to be



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granted to Williams. If Wollner, Hirschberg & Co. entered into this agreement, and then violated it, in order to get a preference for themselves, they were guilty of bad faith and fraud; and if they entered into the negotiations only to throw the other creditors off their guard, until they could consummate a private arrangement for themselves, they were equally guilty of fraud.—*Seaman v. Nolen*, 68 Ala. 463; *Kerr on Fraud*, 150; *Tate v. Williams*, L. R., 2 Ch. Ap. 61; 3 Wait's *Actions & Defenses*, 444. The fraudulent intent of Williams can not be doubted; and though Newhouse denies that he knew of such insolvency, he admits facts which charge him with notice.—*Crawford v. Kirksey*, 55 Ala. 293; *Lehman, Durr & Co. v. Kelly*, 68 Ala. 200. The purchase by Newhouse went beyond the permissible purpose of securing the payment of his own debt, and placed \$600 in the debtor's hands, safe from the reach of creditors, when he knew, or had good reason to believe, that Williams was insolvent, and that his purpose was illegal; and the entire transaction is fraudulent in law.—*Lehman, Durr & Co. v. Kelly*, 68 Ala. 202; *Seaman v. Nolen*, 68 Ala. 466; *Covanhoven v. Hart*, 21 Penn. St. 496; *Hopkins v. Langton*, 30 Wisc. 379.

R. H. CLARKE, *contra*. (No brief on file.)

CLOPTON, J.—In *Hodges Bros. v. Coleman & Carroll*, 76 Ala. 103, we held, that a debtor in failing circumstances, or insolvent, may sell a part, or the whole of his property, in payment of an antecedent debt, to the exclusion of his other creditors; and that a sale on such consideration, the debt being *bona fide*, and its amount not materially below the value of the property, will be sustained, whatever may have been the attendant circumstances or badges of fraud, or may have been the intentions of the debtor, and whatever notice of such intentions the purchasing creditor may have had, if no use or benefit is secured to the debtor. The rule declared in this case was re-affirmed in *Meyer v. Sulzbacher*, 76 Ala. 120. The rule rests on the right of the vigilant creditor to obtain payment of his debt, and on the right of the debtor to prefer his creditor. Such preference by sale, for the purpose of paying the debt, without the debtor reserving, or being promised any use or benefit, does not operate any legal damage to the other creditors. The justness and sum of the debt being established, and it being ascertained that the value of the property does not materially exceed its amount, and that no use or benefit is reserved by or secured to the debtor, all further inquiry is foreclosed.

The justness and amount of the debt due to Wollner, Hirsh-

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berg & Co., is not disputed. While the attorney's fee and costs paid in contesting the sums due on the prior mortgage, which they agreed to pay, and the expenses incurred in collecting the mules, should not be considered as constituting a part of the antecedent debt in ascertaining its amount, we can not say, on an examination of the evidence, that, in view of the circumstances and condition of the property, the chancellor erred in finding that the value did not materially exceed the amount of the debt; and the evidence does not show any use or benefit reserved by or secured to the debtor.

The sale of the lands to Newhouse Brothers does not come within the protection of this rule. While the vigilant creditor may procure the payment of his claim against a failing or insolvent debtor, by a purchase of his property, he must not go beyond the permissible purpose of securing his own demand. If he go beyond this, and secure a benefit to the debtor, he will thereby violate the letter and spirit of the statute, and his conveyance will be set aside for fraud.—*Crawford v. Kirksey*, 55 Ala. 282. The whole purpose of the creditor must be the payment of his debt. This is the boundary of the reward and protection, which the law gives the vigilant creditor. In effecting this purpose, he must not unnecessarily hinder or delay other creditors, or impair their rights, by placing it in the power of the debtor to effectually screen a part of the proceeds, the creditors having knowledge of facts sufficient to create a reasonable belief that such is his intention. No part of the purpose must be ease or favor to the debtor. The law will not allow the use of a debt as a cover of property, or to hinder and embarrass other creditors in the collection of their demands. When, therefore, a creditor purchases property from his debtor, a part of the consideration being the payment of an antecedent debt, and a part money paid, the rules applicable are the same as to purchasers on a new consideration, the payment of a just debt being a circumstance to be considered in pronouncing on the good faith of the transaction. There is a marked distinction between a sale for the sole purpose of preferring a creditor, and a sale the effect of which is partly a preference, and partly a benefit to the debtor.

The facts established by the evidence show the fraudulent intent of Williams. The arrangement made in Mobile, a few days previously, by which his creditors agreed to extend their debts another year, and to advance him fifteen hundred dollars to carry on his business, on his giving a mortgage to secure them; his letter of March 24th, sending schedules of his property and liabilities, in accordance with the previous understanding, but proposing a modification so as to give him longer time, and urging that all his creditors must fare alike; his over-

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estimate of the value of his property; the sale of the lands to Newhouse Brothers on March 26th, and his reception of nearly six hundred dollars in money, which he withheld from his creditors; his withdrawal, on the same day, of the arrangement with the complainants, and asking them for a proposition; and his claim of other property, as exempt from the payment of his debts, to the value of one thousand dollars, made two days thereafter, are too clearly indicative of an intent to defraud the complainants to admit of serious question. But Williams' intent will not vitiate the sale to Newhouse Brothers, unless they participated in it to some extent. It is not necessary that they should have had a specific intent to defraud, but if, having knowledge of Williams' intent, or of facts sufficient to put them on inquiry, they aided in enabling him to consummate his purpose, the sale will be invalidated.

The discrepancy between the evidence of Newhouse and Jones casts suspicion on the transaction. Newhouse's account is, substantially, that about the 26th of March he accidentally met Williams in Demopolis, and pressed him for the payment of the debt to Newhouse Brothers, which had been some time past due, and which he had repeatedly promised to pay. On Williams expressing his inability to pay, security in some way was insisted on; and upon Williams' assurance that he was unable to secure the debt, Newhouse proposed to purchase property, and Williams said he would sell him property, if he had the legal right, but would first consult his attorney. After consulting his attorney, Williams went back to the office of Newhouse Brothers, and proposed to sell them the lands; they refused, at first, to purchase, as they did not wish to pay so much in cash, and requested Williams to convey to them a piece of the land about equal in value to the amount of his indebtedness. This Williams refused to do, saying he wanted some cash for purposes which will be hereafter noticed. Newhouse Brothers bought the lands at one thousand dollars, and, after deducting the aggregate amount of their debt, and two other debts named by him, paid him five hundred and ninety-six dollars in cash. Newhouse says no one was present at the time the trade was made, but Jones was present when the deed was executed. Newhouse's account shows an *accidental* meeting in Demopolis, eleven miles from the residence of Williams, excluding the idea or supposition of any previous conference, and the consummation of the sale on the same day. The testimony of Jones shows that they were together in his office on the day preceding, when he learned from one, or both of them, that Williams was indebted to Newhouse Brothers, who were urgent in demanding payment, and that some discussion followed, but nothing was agreed on. On the next day they came



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together to his office, when Newhouse stated, that he had informed Williams that, as he could not pay Newhouse Brothers in money, they were willing to receive payment in property; that Williams said he was willing to pay in that way; and both desired to know of witness if such payment would be legal, and upon being assured it was legal, they proceeded to arrange the terms of the settlement, and the trade progressed, and was made as testified by Newhouse. Instead of an accidental meeting on the 26th, and completing the arrangement in one day, they were together in Jones' office on the 25th, and were engaged parts of two days. Instead of Williams going alone to consult his attorney, and returning to the office of Newhouse Brothers, where the purchase was agreed on, they went together to consult Jones, and agreed on the terms in his office; or, if the terms were agreed on in the office of Newhouse Brothers, when Jones was not present, they subsequently went substantially through the same course of discussion and agreement in the office of Jones. These discrepancies induce a suspicion that Newhouse has not declared all that passed between him and Williams.

The debt of Williams to Newhouse Brothers amounted to two hundred and eighty-two dollars, while the price paid for the lands was one thousand dollars. In *Bump on Fraud. Conv.*, p. 194, the rule is laid down as follows: "Although the purchase exceeds the amount of the indebtedness, still, if the excess is reasonably necessary for attaining the lawful purpose of satisfying the actual debt, the purchase to the whole extent may be attributed to the same motive of self-interest; and therefore the mere fact of the excess does not invalidate the transaction, unless there are other circumstances tending to show a fraudulent intent on the part of the purchaser." We do not understand the author to mean a necessity created by the unyielding demand of the debtor for cash, but a reasonable necessity arising from the nature, situation, or condition of the property. There were three separate tracts of land, one of which was valued at three hundred dollars. The purchase of this tract alone, or of either one of the tracts, would not have excited any suspicion of fraud. Newhouse Brothers did not wish to purchase all of the lands, but Williams required a purchase of all or none. It is no excuse for the preferred creditor, in such case, that his purpose was to secure payment of an honest debt, and that he made the only and best arrangement which the debtor was willing to make.—*Wiley, Banks & Co. v. Knight*, 27 Ala. 326. The demand of their debtor, that they should purchase all three tracts, when one of them was sufficient to pay their debt, and the other two preferred creditors named, ought to have satisfied them, that the sole

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purpose of the debtor was not the payment of an honest debt, to make a mere preference of creditors, but that his ultimate purpose for converting real estate into money, was, in the terse language of Chief Justice Black, "because money is more easily shuffled out of sight than land," and that he was employing the payment of a debt as the means of accomplishing this purpose.—*Lehman, Durr & Co. v. Kelly*, 68 Ala. 192.

While Newhouse Brothers did not know that Williams was insolvent, they believed that he was unable to pay all of his indebtedness. Slight inquiry would have led to the discovery that he was insolvent; that his other real estate was under mortgage; that his stock of merchandise was of inferior quality, and small in amount; that with such stock the cash he received could not enable him to carry on his business under the burden of indebtedness that was pressing on him, and that this pretense for wanting cash was untrue. Being charged as having knowledge of these facts, which reasonable inquiry would have disclosed, it was their duty to pause and inquire before completing the purchase. Having constructive notice of his fraudulent purpose, they must suffer the condemnation of the law, by reason of the fraud which they enabled their debtor to perpetrate.—*Lehman, Durr & Co. v. Kelly, supra*.

An insolvent debtor is not denied the right to sell his property; but the purpose of the sale must be to appropriate the proceeds, to the full extent, to the payment of his debts; and if the purchaser has a reasonable expectation that they will be so applied, he is not chargeable with participation in any secret fraudulent intent of the debtor. Williams' avowed purpose for selling all the lands was, that he wanted cash to carry on his business, and procure family supplies. The legal duty of a debtor is to keep his property open to his creditors, and not to put it beyond their reach, nor dispose of it for any purpose other than the payment of his debts. Lands, subject to the claims of the creditors, were converted into cash, in part, with the expressed design of the debtor not to use it in paying any of his debts. A substantial benefit was secured to the debtor, to the injury of the other creditors. It is not necessary that Newhouse Brothers should have had an actual intent to hinder, delay, or defraud the other creditors of Williams. Having knowledge of his inability to pay his other indebtedness, and co-operating with him in converting his lands into cash, with the avowed intention to expend it to his personal use, to the exclusion of his creditors, they went beyond the permissible purpose of securing the payment of their debts. Such sale the law condemns as fraudulent.—*Seaman v. Nolen*, 68 Ala. 463; *King v. Kenan*, 38 Ala. 63; *Sims v. Gaines*, 64 Ala. 392; *Reynolds v. Cook*, 31 Ala. 634; *Lukins v. Aird*, 6 Wall. 78.

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Partners can not, during the continuance of the partnership, claim an individual exemption in partnership property.—*Giovani v. First Nat. Bank*, 55 Ala. 307. This rests on the principle, that the title and ownership of partnership property is in the partnership, and neither partner has any exclusive right to any part thereof. Partnership creditors, as such, have no lien on the property. Each partner has a lien to pay the partnership debts, and through this lien an equity in favor of the creditors may be worked out. One partner may sell to his co-partner, and when he sells, without a reservation, his lien falls, and the effects become the exclusive property of the purchasing partner.—*Reese & Heylin v. Bradford*, 13 Ala. 837. In such case, if the sale is fair—no fraud intended—an exemption may be claimed. We find no evidence in the record that the sale of Brasfield to Williams was made with any fraudulent intent. It may be that the chancellor had jurisdiction to try the claim of exemption; but, if so, his declining to take jurisdiction is error without injury to complainants.

The decree is reversed, as to the sale and conveyance to Newhouse Brothers, and affirmed in all other respects. A decree will be rendered, that the sale and conveyance to Newhouse Brothers are fraudulent and void as to complainants, and that the lands conveyed to them by Williams and by Williams & Brasfield, be sold by the register for the satisfaction of complainants' demands. The costs of appeal in this court, and in the Chancery Court, will be divided between appellants and Newhouse Brothers. L. J. Pace will pay one-fifth of the costs of suit in the Chancery Court, and four-fifths will be divided between complainants and Newhouse Brothers.

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### *Bill in Equity for Specific Performance of Contract.*

1. *Want of mutuality, as defense against specific performance.*—When the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time; the road having been completed within the specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that



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the projectors should not be liable in damages if they failed to construct the road, comes too late after the completion of the work.

2. *Want of incorporation as defense.*—Since railroads may be built by private enterprise, without the aid of corporate powers, it is no objection to a specific performance of such contract that the projectors of the road had not been incorporated when the contract was made.

3. *Assignment of contract; bill by assignee.*—The bond being made payable to the projectors by name, “their associates and successors,” and duly assigned by them to a corporation, by which the road was built as stipulated, that corporation may maintain a bill for the specific performance of the contract.

4. *Railroad corporation; power to acquire mineral lands.*—A railroad corporation can not, without an express grant of power, acquire or recover mineral interests in lands, since such property is neither necessary nor proper for carrying out the purposes of the corporation.

5. *Estoppel by contract with corporation.*—If a party who contracts with a corporation thereby estops himself, when sued on the contract, from denying the power of the corporation to make it, as to which the decided cases are conflicting, the principle does not apply when a corporation seeks to enforce a contract as assignee of one of the original parties.

6. *Corporation; when can not enforce executory contract.*—A corporation can not, without an express grant of power, sue on an executory contract, and recover an interest in lands, when it does not appear that such land or interest is necessary for carrying into effect some power or purpose for which the corporation was created.

APPEAL from the Chancery Court of Fayette.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 18th day of February, 1884, by the Georgia Pacific Railroad Company, a corporation chartered under the laws of Alabama, against M. D. Wilks and J. C. Wilks, his wife; and sought the specific performance of a contract, which, as reduced to writing, and signed by the defendants, was dated March 12th, 1880, and in these words:

“State of Alabama, } Know all men by these presents, that  
County of Fayette. } *whereas* Alfred H. Colquit, of DeKalb  
county, Georgia, Eugene C. Gordon and Walter S. Gordon, of  
the county of Jackson, State of Alabama, and their associates,  
propose to build a railroad from some point on the Tombigbee  
river, at or near Columbus or Aberdeen, Mississippi, or from  
some point on the South and North Railroad of Alabama, or  
from some point on the Alabama Great Southern Railroad, or  
from some point on the Memphis and Charleston Railroad,  
and running into or through the county of Fayette, or the  
county of Walker, State of Alabama, or both; *and whereas*  
the building of said railroad would, in our opinion, enhance the  
value of our farming and timbered lands, and of the produc-  
tion thereof; *and whereas* the building of said railroad would  
become a convenience and advantage in various ways to our  
property and our labor, in furnishing facilities for transporta-  
tion and more rapid communication to and with the markets

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of the country : Now, for and in consideration of all the benefits and advantages, which, in our opinion, would accrue to us from the building of such railroad, should the said A. H. Colquit, E. C. Gordon and W. S. Gordon, and their associates and successors, within four years from the date of this instrument, begin or cause to be begun the work of surveying and building or grading such railroad, and shall, within three years from this date, extend the said railroad so as to reach the county of Fayette, or the county of Walker, State of Alabama, or both, then, and in that event, and in consideration of all these benefits and advantages likely to accrue to us from the building of such railroad, we, M. D. Wilks and J. C. Wilks, of the county of Fayette, State of Alabama, do hereby agree and bind ourselves, our heirs, administrators and assigns, to make unto the said A. H. Colquit, E. C. Gordon and W. S. Gordon, their associates or successors, good and sufficient titles to all the coal and iron upon and in the following described lands," describing them ; "together with the right to enter upon the said lands, and prospect for coal and iron, and to mine the same, if they should desire ; also, the right of way of roads and railroads across our lands ; this consideration of coal and iron, so to be deeded, being the said advantages and benefits to us from the building of the proposed railroad. It is further especially and expressly understood, that no such deeds to the coal and iron we own shall be made to the parties named in this instrument, unless they shall build the railroad as specified in this instrument ; nor, on the other hand, shall the parties who now propose to build this railroad be liable for any damages, should they fail to build the same. The object of thus deeding, or of thus binding ourselves to deed our coal and iron interests, on certain conditions, to the said A. H. Colquit, E. C. Gordon and W. S. Gordon, their associates and successors, is hereby expressly declared to be, to induce these parties and their associates to build the said railroad in consideration of the coal and iron to be deeded to them free of any charge. In witness whereof," &c.

The bill alleged that, on the 4th May, 1882, this written instrument was transferred and assigned by said Colquit and Gordons, for valuable consideration, to the Richmond and Danville Extension Company, a corporation chartered by New Jersey and Mississippi, and afterwards, on the 20th December, 1883, by said company to the complainant ; that the railroad was constructed and completed within the time specified, and that the defendants refused to execute to the complainant, when tendered for execution, a conveyance according to the terms of the obligation.

The defendants demurred to the bill, assigning the following,  
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with other grounds of demurrer: (4.) The bill shows that said supposed covenants are without any legal consideration whatever. (5.) The bill shows that said supposed covenants or agreements were entered into by said defendants with said Colquit and Gordons as individuals, upon the condition that they and their associates were, within a certain time, to complete and operate a certain railroad from one or another of the points designated, to one or another of the points named; and it fails to show that they and their associates had any authority from the State of Alabama to commence, build or operate a railroad as therein contemplated and set forth. (6.) It fails to show that said Colquit and Gordons have complied with the stipulations of said instrument, or to show why they have not complied. (7.) It shows that said supposed covenants, as set forth in said instrument, were personal covenants between the parties named, and were mutual and dependent covenants, binding on said defendants only in the event that said Colquit, Gordons and their associates should begin and complete said road within the time therein specified; and it shows that said Colquit and Gordons did not build or complete said road. (8.) It fails to show that the complainant has complied with the requirements of the law in obtaining its charter; or that it was authorized by its charter to make the contract by which it claims to be the owner of said obligation; or that it has any authority to purchase real estate, or *choses* in action, or dependent covenants, or to become the successor of any other corporation, or to enter into contracts with another corporation. (9.) It fails to show any valid and legal assignment of said obligation. (10.) It shows no equitable cause of action in favor of complainant. (11.) There is no mutuality in said contract or obligation. (12.) The bill fails to show any transfer of said obligation to the Richmond and Danville Extension Company. (13.) It fails to aver the complainant's corporate existence, or to set out the powers granted by its charter. (14.) It fails to show that the complainant is authorized by its charter to take and hold real estate.

The chancellor overruled the demurrer on each of these grounds as assigned, and his decree is here assigned as error.

E. A. POWELL, and NESMITH & SANFORD, for appellants, insisted on each specific cause of demurrer as assigned, and cited the following authorities: Frye on Specific Performance, § 286, 666; Waterman on Specific Performance, §§ 195, 207, 225; Pomeroy on Contracts, § 162; *Lawrence v. Butler*, 1 Sch. & Lef. 13; *Irwin v. Bailey*, 72 Ala. 472; *Moon v. Crowder*, 72 Ala. 89; *Derrick v. Monette*, 73 Ala. 78; *Buck v. Smith*, 18 Amer. Rep. 84; 1 Chitty's Gen. Practice, 825, 831; Story's Equity, §§ 741-42.



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McGUIRE & COLLIER, APPLING & McQUEEN, and THOS. N. McCLELLAN, *contra*, cited the following authorities: (1.) As to the consideration of the contract, 3 Washb. Real Property, 370; 4 Amer. & Eng. Railway Cases, 101; 1 Sugden on Vendors, 319, *note*; *Goodlett v. Hansell*, 66 Ala. 161; 49 Miss. 639; *Railroad Co. v. Bacon*, 33 Mich. 466; *Bibb v. Freeman*, 59 Ala. 616; *Erwin v. Erwin*, 25 Ala. 241; Waterman on Specific Performance, 249, 252, 301; 12 Pick. 547; 6 Pick. 427; 22 Pick. 91; 16 Wall. 667, 678. (2.) As to the supposed incapacity of Gordon and associates to build the road, 56 Penn. St. 413; 70 Penn. St. 210; 1 Wood's Railway Law, 3; *Bishop v. North*, 11 Wall. 429; *Bank v. Edgerton*, 30 Vt. 182; 1 Redf. Railw. 4; *Rogan v. Aiken*, 9 Amer. & Eng. Railway Cases, 201; *Railway v. Walker*, 2 Gale & D. 340. (3.) That the objection on account of the supposed want of mutuality can not avail, the complainant having performed all stipulations of the contract on its part, Waterman on Specific Performance, 268; *Perkins v. Hadsell*, 50 Ill. 216; 50 Barb. 24; 51 N. Y. 629; Morawetz on Corporations, § 100; 4 Minn. 141; *Irwin v. Bailey*, 72 Ala. 473. (4.) As to the assignment of the contract, and the right of the assignees to enforce it, *Goodlett v. Hansell*, 66 Ala. 151; 12 Amer. & Eng. Railway Cases, 670; 43 Mich. 584; 24 Mich. 389; 33 Mich. 466; Code, § 2099. (5.) That the question of *ultra vires* does not arise in the case, Morawetz on Corporations, § 117; *Matthews v. Murchison*, 9 Amer. & Eng. Railway Cases, 693; 16 *Ib.* 501; *Duke v. Cahaba Nav. Co.*, 16 Ala. 372; 1 Wood's Railway Law, 503, *note*; 22 N. Y. 494; *Thompson v. Wheeler*, 44 Iowa, 239; Wood on Corporations, § 237; 61 Ala. 464; *Morgan & Raynor v. Donovan*, 58 Ala. 241.

STONE, C. J.—Wilks, in consideration that Colquit and the Gordons, their associates and successors, would, within three years, construct a railroad from one of several named connections, “so as to reach the county of Fayette, or the county of Walker, State of Alabama, or both,” bound himself, by bond in writing, to make to said Colquit and Gordons, their associates or successors, good and sufficient titles to all the coal and iron upon and in certain described lands; and also to secure to them right of way, etc. This bond bears date May 12, 1880. On May 4, 1882, Colquit and the Gordons assigned the bond to the “Richmond and Danville Extension Company,” a corporation chartered by New Jersey and Mississippi, and having very large powers,—among them, the right to construct railroads, and to own lands. On December 20, 1883, the Richmond and Danville Extension Company assigned and transferred said bond to the Georgia Pacific Railway Company, a

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corporation chartered under the laws of Alabama. The bond contains the following clause: "It is further specially and expressly understood, that no such deeds to the coal and iron we own shall be made to the parties named in this instrument, unless they shall build the railroad as specified in this instrument; nor, on the other hand, shall the parties who now propose to build this railroad be liable for any damages, should they fail to build the same."

The present bill was filed by the Georgia Pacific Railway Company, in February, 1884, and prays a specific performance of said contract. It alleges the completion of the railroad within the time stipulated, tender of a deed to be signed by Wilks, in accordance with the terms of the bond, and his refusal to execute the conveyance. There was a demurrer to the bill, assigning many grounds. The chancellor sustained the demurrer, on the first three grounds, and overruled it as to the others. The demurrant appeals, and assigns as error the chancellor's ruling on the several grounds assigned.

1. It is urged, in support of the demurrers, that the contract we are considering was and is wanting in mutuality, a necessary ingredient in every asserted right to specific performance. We need not decide, in this case, that the obligor, at any time before the railroad was constructed, or before material and substantial steps were taken in its construction, could not have withdrawn from the bargain. That is not this case. Here, the condition was complied with, and the railroad completed, before any dissent from, or dissatisfaction with the agreement, was made known. The question is not distinguishable in principle from an offer of sale, coupled with an option reserved to the other party of saying whether or not he will purchase. Until there is acceptance, there is no sale; and until the offer is accepted, it may be withdrawn by the offerer, if there be nothing else in the transaction. If, however, the offer is accepted within the agreed time, or within a reasonable time, when no particular time is fixed, then the contract is complete, and neither party can withdraw, without the consent of the other. And a contract thus made, the other conditions existing, is a proper subject of specific performance in a court of equity. There is nothing in this objection.—1 Benj. on Sales (4th Amer. Ed.), § 41; *Perkins v. Hadsell*, 50 Ill. 216; Pom. on Contr. § 169, note 1 to § 167; Whar. Spec. Per. §§ 200, 201; *Derrick v. Monette*, 73 Ala. 75; *Reese v. Board of Police*, 49 Miss. 639; *Mich. Mid. R. R. Co. v. Bacon*, 33 Mich. 646; *Kerr v. Purdy*, 50 Barb. 24; *Seagur v. Burns*, 14 Minn. 141; *Swartout v. Mich. A. L. R. R. Co.*, 24 Mich. 390; *Olineal v. Board of Police*, 24 Miss. 9; *Waters v. Internal & G. N. R. R. Co.*, 54 Tex. 294; *Williams Col. v. Dan-*

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*forth*, 12 Pick. 541; *Amherst Academy v. Cowles*, 6 Pick. 427; *Gibbons v. M. & G. R. R. Co.*, 36 Ala. 410.

2. A second objection urged is, that it is not shown that Colquit, Gordons and their associates, had any corporate authority to construct a railroad. Railroads may be built by private enterprise, without a charter.—1 Redf. Railways, introduction, sub-section 6; 1 Wood's Railway Law, § 2; *Rogan v. Aiken*, 9 Amer. & Eng. R. R. Cas. 201; *Bank v. Edgerton*, 30 Verm. 182.

3. A third objection is, that a right to sue on Wilks' bond or obligation can not be assigned, so as to vest in the assignee a right to maintain the present bill. The complainant may be regarded, under the terms and purposes of the contract declared on, as the successor of the persons with whom the contract was made. The bond, on its face, is made payable to Colquit, Gordons, their associates and successors. The enterprise they were entering upon was the construction of a railroad, necessarily involving the expenditure of a large sum of money. It is by no means probable that any charter had then been obtained for the construction of their road. They were but canvassers for material aid for their, probably, stupendous enterprise. Succeeding in obtaining sufficient outside aid, the next step usual in such adventures was incorporation. The road, if built at all, would probably be built by a corporation; possibly, a succession of corporations, if we may draw an inference from the history of kindred enterprises. The company, or corporation, which did the work and constructed the railroad, must be regarded as the successor of the associates who solicited and obtained the help which enabled them to complete their undertaking. There is nothing in this objection.—*Goodlett v. Hansell*, 66 Ala. 151; 6 Amer. & Eng. R. R. Cas., 622.

4. The present suit is brought by the Georgia Pacific Railway Company, a private corporation. Ownership of land, or an easement in land, except for purposes of its construction and operation, is not among the incidental powers of such corporation.—*Morgan v. Donovan*, 58 Ala. 241. And it is not shown that the act of incorporation conferred this power. Without expressly granted power, it could neither acquire nor recover mineral interests in lands; for such property does not appear to be necessary and proper for carrying out the purposes of the corporation. Some of the grounds of demurrer interposed by defendants are based on a failure of the bill to show that complainant had authority to acquire the property it seeks to recover.

5. The rulings of different courts, on this question, are not uniform. In some States it is held, that by contracting with a



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corporation, the party contracting estops himself from disputing the power of the corporation to make such contract.—*Waterman on Spec. Per.* § 226; *Kansas City Horse Railroad Co. v. Hovelman*, 79 Mo. 632; *Parish v. Wheeler*, 22 N. H. 494; *Thompson v. Lambert*, 44 Iowa, 239; *Wilcox v. Toledo & Ann Harbor R. R. Co.*, 43 Mich. 584. That principle, however, even if it prevailed in this State, could not aid the present bill. Wilks made no contract with the corporation. His contract was with Colquit and the Gordons.—*Marion Savings Bank v. Dunkin*, 54 Ala. 471.

6. The case, then, presents the naked question, whether a corporation, without express power therefor, can sue on an executory contract, and recover an interest in lands, when it does not appear that such land or interest is necessary for carrying into effect some power or purpose for which the corporation was created. Our uniform rulings for forty years require us to answer this question in the negative.—*Smith v. Ala. Life Ins. Co.*, 4 Ala. 558; *City Council v. M. & W. Plank-road Co.*, 31 Ala. 76; *Waddill v. A. & T. R. R. Co.*, 35 Ala. 323; *Grand Lodge v. Waddill*, 36 Ala. 313; *Marion Savings Bank v. Dunkin*, 54 Ala. 471; *City of Eufaula v. McNab*, 68 Ala. 588.

As the bill now stands, the demurrer to it ought to have been sustained. We can not, however, know that it can not be so amended as to give it equity. We will, therefore, make no final decree of dismissal, but will remand the cause, that complainant may have the opportunity of offering an amendment as it may be advised. If the bill can not be so amended as to obviate the difficulty pointed out above, it must be dismissed. The demurrer is sustained.

Reversed and remanded.

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### ***Ex parte Dudley.***

*Arbitration of Pending Suit; Mandamus to Chancellor, in matter of Award; Motion to Dismiss Appeal.*

1. *When appeal lies.*—An appeal is given by statute (Code, § 3547) from a judgment setting aside an award, or entering it up as the judgment or decree of the court; but not from the refusal of the chancellor to enter up the award as the decree of the court, which is merely an interlocutory order.

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2. *When mandamus lies.*—If the chancellor improperly refuses to enter up an award as the judgment and decree of the court, a *mandamus* is the only adequate and appropriate remedy to revise his action.

3. *Entering award as judgment of court.*—When an award is rendered in substantial conformity with the statutory provisions authorizing the submission of pending suits to arbitration, and is not performed within the time specified, it is the duty of the judge or chancellor to enter it up on motion, as the judgment or decree of the court (Code, § 3537); but the statute does not apply to a common-law award, which can only be entered up as a judgment on consent of parties given *in judicio*.

4. *Submission without order of court.*—A submission of the matters in controversy in a pending suit to arbitration, without an order of court, is not a statutory arbitration; nor can the award be entered up as the judgment of the court, against the objection of one of the parties.

5. *Appointment and substitution of arbitrators.*—When only one of the persons originally named as arbitrators acts, and the appointment of the others as substitutes is not made by him by memorandum entered on the submission, nor by the parties themselves in writing, the proceedings do not conform to statutory requisitions (Code, § 3540); and the award can not be entered up as the judgment of the court, except by consent.

### APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

These two cases are branches of the case which was before this court at its last term.—*Farris & McCurdy v. Dudley*, 78 Ala. 124. The original bill was filed by Joseph R. Dudley, and sought to abate, as a nuisance, an embankment, or levee, which Farris & McCurdy had erected on their own lands, on the east side of Big Swamp creek, and by which, as the complainant alleged, the waters of the creek were accumulated, in times of heavy rains, and thrown in increased volume upon his lands on the other side of the creek; and the bill also prayed an inquiry and account of the permanent damages which the complainant had sustained. After the reversal and remandment of the cause, as shown by the former report, the matters in controversy were, by consent, submitted to arbitration; the agreement being reduced to writing, and signed by the parties, but without any order of court. In the agreement it was stated, that E. G. Maull and S. A. Satterwhite were selected as arbitrators by the parties, and that that said two arbitrators selected T. P. Cory as the third; and it was further stipulated, that the award “shall be the decision and decree of the said Chancery Court.” The agreement was dated October 7th, 1885, and an award was made, dated November 7th, 1885, which was signed by E. G. Maull, L. A. Collier and J. G. Gilchrist, as arbitrators. In this award, as reduced to writing and signed, the change or substitution of arbitrators is thus stated: “S. A. Satterwhite declining to act, J. G. Gilchrist was substituted in his place; and, at the suggestion of Farris & McCurdy, T. P. Cory was dropped, and L. A. Collier was selected by J. G.

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Gilchrist as the third arbitrator, all parties having consented to the same." By the terms of the award, \$5,000 as damages were awarded to Dudley, to be paid by Farris & McCurdy; and it was further awarded, that Dudley should convey to them a certain part of his lands, for which Farris & McCurdy should pay him \$15 per acre. The award being filed with the register, the complainant moved, at the ensuing March term of the court, to have it entered up as the judgment and decree of the court. The defendants contested this motion, and filed several objections in writing to the award; contending, among other things, that it was not a statutory submission, because it was made without an order of court, and because the substituted arbitrators were not selected or appointed as required by the statute. The chancellor sustained the objections, and refused to enter up the award as the decree of the court. From this refusal the complainant sued out an appeal, and here assigned the same as error; and he also filed in this court a petition for a *mandamus*, to compel the chancellor to enter up the award as the decree of the Chancery Court. A motion to dismiss the appeal was submitted by the appellees, and the motion and petition were submitted together.

WATTS & SON, and G. COOK, for the appellant and petitioner.

W. L. BRAGG, and W. C. GRIFFIN, *contra*.

SOMERVILLE, J.—The motion to dismiss the appeal, in the first of these causes, which appeal was taken from the action of the chancellor refusing to enter up the award of the arbitrators, as the decree or judgment of the Chancery Court, must be sustained. The refusal of the chancellor to enter this award is not a final, but an interlocutory judgment, and is not revisable in this court. The statute allows an appeal only from the judgment or decree entered up by the court on the award, or from the judgment setting aside the award. The present case does not fall within either of these categories. Code, 1876, § 3547; *Collins v. Louisville & Nashville R. R. Co.*, 70 Ala. 533.

We proceed to consider the merits of the second cause, which is an application for the writ of *mandamus*, to compel the chancellor to enter up the award of the arbitrators as the judgment of the Chancery Court. And we assume that, in a proper case of this character, *mandamus* would lie, as the only adequate and appropriate remedy of the petitioner.

There are two kinds of arbitrations and awards recognized as of force in this State—the one authorized and regulated by statute, and the other governed by the rules of the common



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law. In many respects, they are essentially different; in others, closely analogous. These points we will not stop to discuss, except in one particular. It is only an award which is made in substantial compliance with the provisions of the statute, or a statutory award, which the law makes it compulsory on a judge or chancellor to enter up as the judgment of the proper court, if the award is not performed within a specified time.—Code, § 3537. A court has no authority to enter up as its judgment a common-law award, unless by the consent of parties litigant solemnly given *in judicio*. A consent given out of court, and afterwards revoked, will not do. This is not a consent judgment, in any proper sense of the term.

The question, then, presented for decision here, is, whether the present award has been rendered in substantial compliance with the provisions of the Code establishing a regular system of statutory arbitrations, or minor courts of liberal powers and jurisdiction, by which parties are authorized to submit all their controversies for decisions to judges of their own choosing. Code, 1876, §§ 3536–3550.

There are two sufficient reasons, if not more, why this award is defective, as failing to comply with the requirements of the statute.

The first is, that a suit was pending at the time of the submission, involving the matters of controversy submitted to the arbitrators, and no order of court was made authorizing the submission. This, the statute, in our opinion, clearly contemplates and requires. When a suit is pending as to any controversy, a submission under the statute can be had only by an order of the court, which has assumed jurisdiction of the cause, authorizing such submission. This can be done on motion of the parties, and the granting of the order is mandatory on the court. The order, however, does not operate to discontinue the cause, but it remains on the docket in abeyance only, and is subject to continuance and future control by the court at any subsequent term, if the submission is not executed with reasonable diligence.—*Shelby Iron Co. v. Cobb*, 55 Ala. 336; Code, 1876, § 3536. It is only in cases where no suit is pending, that a statutory arbitration can be made by the mere consent of parties, and without an order of court.—Code, 1876, § 3537. The language of the statute on this subject is clear, and there is good reason in requiring of parties litigant, who have invoked the jurisdiction of a court to settle their disputes, to request an order of reference before submitting their cause to the arbitrament of another tribunal; for it is only where an agreement to arbitrate is made under a rule of court, that its violation or disobedience is subject to attachment for a contempt.—2 Greenl. Ev. § 69; *Simpson v. McBee*, 3 Dev. (N.

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C.), 531: This does not abridge the right of the parties to settle their law-suits in their own way; for they can submit matters involved in pending suits to arbitrament, without any rule or consent of court, now as they could at common law. Code, 1876, § 3548. What effect the submission of a cause, in a mode not conforming to the statute, would have upon the pendency of it, by way of discontinuance or otherwise, has been variously decided by the courts, and no occasion is presented for us to consider this question at this time.—Morse on Arbitration & Award, 73-78.

The second defect in the proceedings, in which they fail to follow the statute, is as to the mode of appointing the arbitrators who acted in rendering the award. In every statutory arbitration, the submission must be in writing, signed by the parties, concisely stating the matter in dispute between them, and that they desire to leave the determination of such controversy to certain persons, who are named specifically as the chosen arbitrators.—Code, 1876, § 3538. If any of the arbitrators fail to attend at the time and place designated, the parties are authorized, if they appear, “to substitute others in their place.”—Code, § 3540. This clearly means to designate others in writing, signed as was the original submission. So, if the parties can not agree, the arbitrators present may themselves appoint others in their stead, of which they “must make a memorandum on the submission.”—Code, § 3540. But one of the three original arbitrators, who were named in writing, acted in the cause. The other two, who did act, were appointed by substitution; and it was neither done by the parties themselves in writing, nor by the arbitrators in the mode prescribed by section 3540 of the Code, which is by “a memorandum on the submission.”

Our conclusion is, that the award was not a statutory, but a common-law award, and that the chancellor had no authority to enter it as a judgment of the court, against the objection of the parties. The chancellor so decided, and his decree is free from error.

The application for the writ of *mandamus* is refused.

## Gresham v. Ware.

### *Bill in Equity for Redemption, by Mortgagor and Surety.*

1. *Redemption by mortgagor as surety; prior application of property of co-mortgagor as principal.*—When the principal and his surety jointly execute a mortgage to the creditor, conveying lands which belong to them separately, the surety has an equity to require that the lands of the principal shall be first sold and applied to the satisfaction of the debt; and he may, after default, maintain a bill to redeem his land, asking a foreclosure as to the property of the principal, and offering to pay the balance that may remain due.

2. *Merger of legal and equitable estates in mortgagee, by purchase of equity of redemption; intervening equity of surety.*—As a general rule, when the legal and the equitable titles become united in the mortgagee, the mortgage is merged in the unity of possession; but there is no merger, when it is to the interest of the mortgagee that the titles be kept distinct, nor when there is an intervening right in a third person; and when the mortgagee purchases the principal's equity of redemption, without the consent of the surety, the equity of the latter to have the property of the principal first applied to the payment of the common debt will prevent a merger.

3. *Same.*—If the purchase of the principal's equity of redemption is made with the consent of the surety, but under an agreement by the mortgagee to take possession, account for the rent, and sell under the power contained in the mortgage, but with a modification of the prescribed terms, there is no merger, and the equity of the surety remains unimpaired; nor can the terms of this agreement be changed, to his prejudice, by a subsequent agreement between the principal and the creditor, to which he is not a party.

4. *Protection to purchaser for value without notice.*—A purchaser for value, without notice, is entitled to protection against the equity of a surety to have the property of his principal first applied in satisfaction of the common debt; but, to make out such defense, the purchaser must not only state his purchase, and the *bona fide* payment of the consideration, with circumstantiality of detail, but must deny notice of the outstanding equity, and knowledge of any fact sufficient to put him on inquiry, down to the time of his payment of the purchase-money; and this denial must be positive, and must be made whether notice is charged or not.

5. *Revision of register's findings on facts.*—As to conclusions of fact drawn by the register on a reference, all reasonable presumptions will be indulged in support of his rulings; and they will not be disturbed unless they are based on wrong legal principles, or are clearly shown to be erroneous on the evidence.

6. *Rents and profits, against mortgagee in possession.*—On statement of the account between mortgagor and mortgagee, under a bill to redeem, a mortgagee in possession will only be charged with rents actually received, unless he has been guilty of willful default, or gross negligence; and the rents must be estimated on the value of the property when he took possession, without regard to permanent improvements afterwards erected by him.

7. *Compensation for permanent improvements.*—A *bona fide* occupant.



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under claim of title, who erects permanent and valuable improvements, is entitled to compensation, at least as a set-off against mesne profits; but knowledge, or notice of adversary rights, is fatal to the claim for compensation; and a mortgagee who repudiates the relation, or a purchaser from him with notice, is regarded as a wrong-doer, and is not entitled to compensation.

8. *Usury in mortgage; estoppel by admission in answer.*—If a mortgagee, in his answer to a bill to redeem, admits the charge of usury, he is estopped from adducing evidence to the contrary; and he can only be allowed legal interest from the date of the loan.

9. *Damages on protest of bill of exchange; as between payee and accommodation acceptor.*—Statutory damages, accruing on the protest of a bill of exchange, are a part of the debt, although an accommodation acceptor is not personally liable for them; yet, being secured by the mortgage, so far as the property of the drawer (and principal debtor) is concerned, they must be allowed in the account, under a bill to redeem by the surety, or accommodation acceptor.

### APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 21st February, 1882, by Mrs. Azenath A. Ware, against L. Gresham, Thos. C. Bingham, and Robert Y. Ware, and sought, principally, to redeem a house and lot in the city of Montgomery, which the complainant had mortgaged to said Gresham. The mortgage was executed by the complainant and said Robert Y. Ware, who was her son, jointly, and it also conveyed a tract of land in Elmore county, called the "Molton place," which belonged to said Robert Y. Ware. The mortgage was dated January 24th, 1872, and was given to secure the payment of a bill of exchange for \$11,200, drawn by said Robert Y. Ware on the complainant, by her accepted, payable to Thos. J. Molton, and by him indorsed in blank. The bill alleged, that this bill of exchange was given for money borrowed by Robert Y. Ware from said Gresham, at a usurious rate of interest, and that complainant accepted it only for the accommodation of said Robert Y., and as his surety; and it prayed that the mortgage might be foreclosed as to the tract of land in Elmore county, and the proceeds of sale applied to the payment of the mortgage debt, offering to pay the balance that might be found due if anything. It was alleged, also, that Gresham took possession of the house and lot in Montgomery, under a pretended sale under the power contained in the mortgage, in October, 1881, and was still in possession when the bill was filed; that he also took possession, in 1873, of the tract of land in Elmore county, and continued in possession until some time during the year 1880, when he sold and conveyed to said Thos. C. Bingham; and the bill sought to charge him with the rents of both places during his possession, and alleged that Bingham was chargeable with notice of the complainant's equitable rights.

An answer to the bill was filed by Gresham, in which he

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admitted the charge of usury, but not to the extent charged in the bill, and also admitted his possession of the mortgaged property during the years specified. But he alleged that, in June, 1873, Robert Y. Ware having become a bankrupt, he bought the equity of redemption in the lands from the assignee, by and with the written consent of the complainant; that afterwards, in April, 1879, he purchased the equity of redemption from said Ware himself, at the agreed value of \$6,900, which was entered as a credit on the mortgage debt, and that this was done with the knowledge and consent of the complainant; and he insisted that the mortgage was thereby foreclosed as to the tract of land. Copies of the complainant's consent to the purchase of the equity of redemption from the assignee in bankruptcy, and of Robert Y. Ware's subsequent conveyance, were made exhibits to the answer. Bingham filed a formal answer, adopting the answer of Gresham.

On final hearing, on pleadings and proof, at August term, 1883, the chancellor rendered a decree, holding that the complainant was entitled to the relief prayed in her bill, and ordering a statement of the accounts by the register. On the statement of the accounts by the register, under this order of reference, numerous exceptions were reserved by both parties; and the cause being submitted to the chancellor again, he sustained some of the exceptions, by a decree rendered in vacation, in August, 1884, and ordered a re-reference.

In December, 1884, an appeal from this last decree, which was entered as of the October term, 1884, was sued out by the defendants; and numerous assignments of error were made, forty-seven in all, some of which were founded on the decree rendered in August, 1883. The appellee submitted a motion to strike out all assignments founded on that decree, on the ground that an appeal from it was barred, and several others, which were founded on portions of the last decree alleged to be interlocutory. The material facts bearing on these assignments are stated in the opinion of the court.

R. M. WILLIAMSON, and ARRINGTON & GRAHAM, for appellant.

GEO. F. MOORE, *contra*. (No briefs on file.)

CLOPTON, J.—Robert Y. Ware and the complainant executed, January 24, 1872, a mortgage to the defendant Gresham, on lands situate in Elmore county, known as the “Molton place,” which were the individual property of Robert Ware, and on a house and lot in the city of Montgomery, which was the individual property of complainant, to secure the payment of a bill of exchange, drawn by Robert Ware on, and accepted

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by complainant, for the sum of \$11,200, and payable twelve months after date. The bill is brought by complainant, to redeem the house and lot. It alleges that the mortgagee entered into possession of the Molton place in 1873, and, as mortgagee in possession, has received the rents from 1873 to 1881, inclusive, which, if applied to the mortgage debt, will, on proper accounting, leave but a small amount, if anything, due; that complainant is an accommodation acceptor, the surety of Robert Ware; and, if anything is unpaid on the mortgage debt, his individual property should be first applied to its payment.

The claim of complainant, to have her property exonerated by the antecedent appropriation of the property of Robert Ware, is founded on the equitable principle, that a debt shall be charged on the person or estate primarily bound,—an equity, not dependent on contract, but growing out of the relation of principal and surety, and resting on natural justice. It is of frequent and liberal application in the administration of equity jurisprudence, and extends to all cases,—no rights of third persons intervening,—where one has paid a debt, for which he was not primarily liable, but which he was under a legal obligation to pay, or was compelled to pay for the protection of his interests, the creditor having, at the same time, collateral securities which he is entitled to apply to its payment. On this principle is based the right of subrogation; and on analogous principle, if a creditor has a paramount lien on two funds, he will be compelled, in favor of a creditor having a subsequent lien on only one of them, to first resort to the fund singly charged, no undue delay or prejudice being caused thereby; or, if he has already exhausted the fund doubly charged, without taking the other, the subsequent creditor is entitled to satisfaction out of the other fund, to the extent his own has been thus appropriated.—*Watts v. Eufaula National Bank*, 76 Ala. 474; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Dec. & Hud. Cass. Co.s' Appeal*, 2 Wright, 512; 20 Vt. 530.

A like equity arises in the case of a mortgage, executed by the principal debtor and the surety, on the separate and individual property of each. Should the mortgagee bring a bill for a foreclosure, and the property of the principal debtor, having been first sold, proves sufficient to discharge the mortgage, the property of the surety will be released; or, if insufficient, and the property of both is sold, when the proceeds are brought into court for appropriation, the portion accruing from the property of the principal will be first applied, and the deficiency paid from the proceeds of the property of the surety, to whom any surplus will be awarded.—*Vartie v. Underwood*, 18 Barb. 561. On a bill for redemption by the surety, the amount to be paid will be ascertained in like manner, and the



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equities adjusted on like principles. The rights of the mortgagee will not thereby be delayed, or obstructed, or impaired, and the surety is not put to circuity of action. The rights of the parties are ascertained and determined in one suit; the mortgagee and surety are both protected, and equity administered. In the case of such mortgage, the surety need not wait the pleasure of the mortgagee as to the time of foreclosure, and suffer his property continued under the incumbrance. As, after the debt has become due, a surety may file a bill to compel the principal to pay it; so, after forfeiture, he may bring a bill for the redemption of his property from a mortgage covering the property of both the principal and himself, without first paying the entire mortgage debt; and in the same suit, as ancillary to redemption, compel the application of the principal's property to its payment. It is sufficient if he pays, or offers to pay, the balance that may be due.

It is insisted by the defendants, without controverting the general rule, that if the complainant is an accommodation acceptor, which they deny, the mortgage has been extinguished as to the Molton place, by the coalescence of the legal estate and the equity of redemption in the mortgagee, and that she has waived her equity. This contention is based on the following facts: In December, 1872, Robert Ware was adjudicated a bankrupt. In December, 1873, the mortgagee purchased from the assignee in bankruptcy the equity of redemption, for one hundred and fifty dollars, by the consent in writing of the complainant, given in June preceding; and in 1877, Robert Ware, in consideration of the sums expended in paying taxes and making repairs, and of a credit of \$6,900 on the mortgage debt, conveyed to the mortgagee the Molton place in absolute right, and relinquished his equity of redemption; to which arrangement, it is claimed, the complainant consented.

As a general rule, when the legal becomes united with the equitable title in the mortgagee, the mortgage is merged by the unity of possession; but, if it is to the interest of the mortgagee to keep the titles distinct, there is no merger, and an intervening right between the mortgage and the equity will prevent a merger.—*Evans v. Kimball*, 1 Allen, 240; *Lowd v. Lane*, 8 Met. 517. If, therefore, the mortgagee had purchased Ware's equity of redemption without the consent of complainant, it would not have operated an extinguishment of the mortgage as against her equity; or, if it did, she would have been released from the debt, and her estate discharged from the mortgage, to the extent of the value of the Molton place. But, having purchased the equity of redemption from the assignee, by and in pursuance of her consent in writing, the mortgagee must be held to the terms of the consent. Her

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agreement to the purchase is on this condition: "*That he take possession of said Elmore land, and of the rent note for 1873, and account for the same under a sale thereof under the power contained in said mortgage, and for the rent this year; and that said sum of \$150.00 be tacked to said mortgage debt as a part thereof; said Elmore county tract of land not to be sold under the said mortgage, before the first day of October, 1873, and, when sold, to be partly for cash, and partly on credit,—say not exceeding one half cash, and the balance on one and two years time, with interest on the credit payments from the day of said sale.*" The effect and meaning of the agreement are apparent. The mortgagee was to take possession, sell under the power contained in the mortgage, with a modification of the terms of sale, and account for the proceeds of sale, and for the rents and profits, as mortgagee in possession. It was expressly stipulated, that the purchase of the equity of redemption from the assignee should not operate an extinguishment of the mortgage; but that it should remain open and operative for the benefit and relief of complainant. Such agreement will prevent a merger as against the rights of a surety; and the equity of complainant is unaffected by the purchase of the equity of redemption from the assignee. *Cullum v. Emanuel*, 1 Ala. 23.

If complainant did not consent to the arrangement, by which the conveyance was made by Robert Ware in 1877, such conveyance or arrangement can not impair or defeat her equities. A creditor, having securities which he is entitled to apply in discharge of the debt, must so apply them, or hold them ready to be so applied, for the benefit of the surety. No agreement between the creditor and the principal, to which the surety is not a party, will defeat the surety's right of subrogation. If the creditor renders such securities unavailing, the surety will be released *pro tanto*. So, likewise, the mortgagee can not, by an arrangement with Robert Ware, to which complainant did not consent, defeat her equity to have the Molton place sold, and the proceeds of sale, with the rents, applied in satisfaction of the mortgage; or cancel or modify the agreement of June, 1872. What would have been its effect, had complainant consented thereto, in view of the fact that Robert Ware had no right or interest in the property which was the subject of conveyance, it is unnecessary for us to decide. The chancellor found the controverted questions of fact—her suretyship and consent to the conveyance—in favor of complainant. The mortgagee testifies, that the paper evidencing her consent was delivered to him *in 1877*, and that he has not seen it *since*, though he has made search for it; yet his attorney testifies, that he saw and read it *in 1879*, when Bingham and

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the mortgagee were both present, and that Bingham took it away with him; and Bingham states, that all the other papers were delivered to him in May, 1880; but Bingham is not examined as to the possession, loss, or contents of the paper. Considering that the burden is on the defendants to establish the genuineness and contents of the lost paper; that proof must be clear and satisfactory; the somewhat vague and discrepant recollection of the witnesses as to its terms, and the positive denial of complainant and T. J. Molton, who is said to be a subscribing witness, whatever may be our opinion as to the preponderance of the evidence, it does not clearly appear that the findings of the chancellor are erroneous. We must, therefore, on appeal, take and consider the facts as found by him.

It is further insisted, that the equity of complainant ought not to be enforced against the defendant, Bingham, who purchased the Molton place from the mortgagee in 1880. Generally, such equity will not be enforced, if its effect is to destroy or impair the rights of an innocent purchaser for value, such purchaser having an equal claim to the consideration of a court of equity. But Bingham does not, either in his answer or otherwise, bring himself within the rule of protection. To make out the defense of innocent purchaser for value, the purchaser must not only state the purchase and the *bona fide* payment of the consideration, with circumstantiality of details, but also must deny notice of the outstanding equity, and knowledge as to any fact sufficient to put him on inquiry, previous to and down to the time of paying the money; and the denial must be positive and not evasive, whether notice be or be not charged by the bill.—*Ledbetter v. Walker*, 31 Ala. 175; *Wells v. Morrow*, 38 Ala. 625; *Hooper v. Strahan*, 71 Ala. 75; *May v. Wilkinson*, 76 Ala. 543. Bingham does not state the purchase, the contents of the deed, or the payment of the money, other than by adopting the general statements in the answer of the mortgagee; and there is no pretense of a denial of notice. In no appropriate manner does he bring before the court the claim of a *bona fide* purchaser without notice, and his rights as such must be considered as eliminated from the case.

The remaining questions arise on the rulings of the chancellor on exceptions to the report of the register, mainly involving the principles on which a mortgagee in possession shall be held to account for rents, and be allowed compensation for repairs and permanent improvements. So far as the assignments of error relate to the conclusions of fact drawn by the register from the evidence before him, all reasonable presumptions are indulged in support of his rulings, and they will not be disturbed, unless it appears they are based on wrong legal princi-



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ples, or are clearly shown to be erroneous on the evidence.—*Winter v. Banks*, 72 Ala. 409.

By the agreement of June, 1873, the mortgagee was to account for the rent of that year. It appears from his own evidence, that when he sent his son, in November, to look after and collect the rent, there were crops on the place liable to its satisfaction; and Jackson, the tenant, testifies, that it could have been collected. When the mortgagee went in December, the crops had been removed. No effort was made in the meantime to collect the rent, though the statute armed him with summary process. The rent was lost by the want of reasonable diligence, and he is chargeable therewith.

From the undisputed evidence, the mortgagee received five hundred dollars for the rent of 1874, and five hundred and fifty dollars for each year from 1875 to 1878, inclusive. It is true, the witnesses vary in their estimate of the annual rental value, from \$500 to \$1,000; but there is an absence of evidence tending to show that greater rent was not obtained by reason of the neglect of the mortgagee. On a bill to redeem, a mortgagee in possession will not be held accountable for anything more than the rents actually received, unless there has been willful default, or gross negligence, which, in such case, is the measure of reasonable diligence.—*Barron, Meade & Co. v. Paulling*, 18 Ala. 292; *Dozier v. Mitchell*, 65 Ala. 511; *Daniel v. Coker*, 70 Ala. 260. Under the circumstances, the mortgagee should not have been charged with more rent than he actually received for the years mentioned. The rents, with which the mortgagee is chargeable, must be estimated on the value of the property when he took possession, and not on the increased value by reason of permanent improvements subsequently made.—*Dozier v. Mitchell*, 65 Ala. 562.

A *bona fide* occupant under claim of title, who makes valuable and permanent improvements, is entitled to compensation, certainly by way of set-off against the *mesne* profits. A *bona fide* occupant has been defined to be "one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming a superior right to it." If a mortgagee after foreclosure, or a purchaser at or after the foreclosure sale, makes permanent improvements, in the honest belief that he has acquired the absolute title, compensation should be allowed on a bill for redemption. Knowledge, or actual notice of the adversary right, is fatal to the claim for compensation. The allowance is made on equitable grounds, and it is not equity to allow it to one who has not acted in good faith; otherwise, a mortgagor might be improved out of his property, by increasing the burden of redemption.—*Gordon, Rankin & Co. v. Tweedy*, 74 Ala. 232;

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*Learned v. Corley*, 43 Miss. 687; *Woodhull v. Rosenthal*, 61 N. Y. 382.

And when a mortgagee in possession repudiates his relation as such, and claims the property as his own, denying the right of redemption, he will be treated in equity as a wrong-doer, and is not entitled to compensation for permanent improvements; and a purchaser from him with notice has no greater right.—*Booth v. Baltimore So. Packet Co.*, 63 Md. 39. On like principles, a mortgagee, who, disclaiming his character as such, claims absolute right to the property of the principal debtor, primarily bound, will not be allowed for permanent improvements thereon, against the equity of a surety seeking to redeem his own property.

The refusal of the register to allow compensation for permanent improvements was evidently based on his conclusion from the evidence, that Bingham had actual notice of complainant's equity, and of the infirmity in his own title. The chancellor approved his conclusion, and the evidence tends strongly to sustain it. Bingham had knowledge of the mortgage, and all the other written instruments, which he states were delivered to him in May, 1880. Some of the improvements were erected after the filing of the bill; and the reasonable inference is, that with knowledge of complainant's adverse right, he made the improvements, relying on his being able to successfully defend against her claim. Having notice of the infirmity of his title, his opinion and belief of its superiority is not the good faith which equity requires. In such case, an occupant makes improvements at his peril.

The mortgagee was entitled to be allowed only the principal, with legal interest from the date of the loan. He admits the usury in his answer; that is, that the bill of exchange was given in consideration of a loan of ten thousand dollars, at twelve per cent. interest *per annum*. This admission in the answer is an estoppel on the defendant from introducing evidence to show it is untrue.—*McGehee v. Lehman, Durr & Co.*, 65 Ala. 316.

The statutory damages accruing on the protest of a bill of exchange, constitute part of the debt, and are recoverable in an action on the bill. It is true the acceptor is not personally liable for them. They are, however, secured by the mortgage so far as respects the property of Robert Ware, equally with the principal and interest; and in ascertaining the amount to be paid by complainant on redemption, and the extent to which his property shall be applied in exoneration of hers, all claims and demands having, by the mortgage, a valid lien on his property, must be taken into the estimate. Relief, founded on equitable grounds, will not be granted, to the prejudice of

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an equity of the mortgagee. The damages and protest fees should have been allowed.

The appeal is taken from the decree rendered at the October term, 1884, which is partly final and partly interlocutory. In connection with the decree of August, 1883, it settles all the equities between the parties, except such questions as arise on the reference ordered, and decrees a sale of the property. In this respect, it is final, and the subject of appeal; but, so far as the chancellor rules on the report of the register, and the exceptions, it is interlocutory, a reference as to subsequent interest and rents being undisposed of. To the extent the decree is final, as above stated, we discover no error, and it is affirmed. Without affirming or reversing the decree so far as interlocutory, we have deemed it proper to consider the assignments of error relating to the rulings on the exceptions to the report of the register as directions in stating the account.

Our conclusion makes unnecessary a decision of the motion to strike out several assignments of error.

The costs of appeal will be divided between the parties.

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### *Attachment by the State.*

1. *Action by State; instructions of governor to attorney-general.*—When an attachment is sued out in the name of the State, by the attorney-general, it is not necessary that he should exhibit the written instructions of the governor for the institution of the suit (Code, § 2902); if such instructions were not in fact given, the objection should be taken by motion to dissolve the attachment, before joining issue.

2. *Count construed as in assumpsit, and not in case.*—In an action brought by the State, against a person alleged to be indebted to it, a special count averring that a large sum of money was deposited in bank by a tax-collector to the credit of the State treasurer, and was used by the treasurer in the purchase of a check on New York, payable to himself as treasurer; that this check was indorsed by him to the defendant, to whom he was indebted on account of private transactions in the purchase and sale of cotton, and who knew that the same belonged to the State, and was applied by the defendant as a payment on said private indebtedness; and that neither the defendant nor the treasurer had ever paid the money over to the State, but it was due and unpaid, is in *assumpsit*, and not in case.

3. *State's right to money deposited in bank by tax-collector, to credit of treasurer.*—Although the tax-collector may have no authority to deposit in bank, to the credit of the State treasurer, moneys collected by him as State taxes; yet, if he does so deposit it, and the money is drawn or checked out by the treasurer, it becomes the money of the State in his hands, as much so as if it had been remitted by private hand.



4. *Action against person receiving public moneys with notice of their character.*—Money being deposited in bank by a tax-collector, to the credit of “*I. H. Vincent, treasurer*,” and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way; these facts are sufficient to charge the indorsee with notice of the official character in which the treasurer held the funds, and if he applies the money in payment of an individual indebtedness of the treasurer to him, he becomes liable to the State, as a trustee *in invitum*, in an action for money had and received.

5. *Same; ratification of unauthorized act.*—The institution of such action in the name of the State, by the direction of the governor, does not amount to a ratification of the illegal act, nor discharge the liability of the treasurer himself; nor is any special legislative sanction necessary to authorize or sustain the action.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES E. COBB.

This action was commenced on the 3d February, 1883, by an original attachment, sued out in the name of the State, against Fred. Wolffe. No affidavit was made, but, instead thereof, a written statement was filed with the clerk by the attorney-general, as follows: “Before me, E. R. Holt, clerk,” &c., “personally appeared H. C. Tompkins, as the attorney-general of the State of Alabama, who is known to me, and who, as such attorney-general, says that Fred. Wolffe is justly indebted to the State of Alabama in the sum of \$139,376.91, which sum is now due and unpaid; that said Wolffe resides out of the State of Alabama, and that this attachment is not sued out for the purpose of vexing or harassing said Wolffe; and further; that he, said Tompkins, as such attorney-general, has been instructed and required by the governor of the State of Alabama, in writing, to commence suit in the name of the said State against said Wolffe, by attachment, for the recovery of said sum of money, with interest thereon. Wherefore he prays that an attachment may issue,” &c.

The original complaint contained only the common money counts, but, by leave of the court, a special count was added by amendment, as follows: “Plaintiff claims of defendant the further sum of twenty thousand dollars, for that whereas, heretofore, to-wit, on and prior to the 10th day of March, 1881, one Charles T. Pollard, as tax-collector of the county of Montgomery, State of Alabama, had collected for the State taxes amounting to the sum of, to-wit, forty thousand dollars, and had deposited the same in the Merchants & Planters’ Bank of Montgomery, Alabama, to the credit of I. H. Vincent as the treasurer of said State, and said money so deposited was the money of the State; that said Vincent was then, and for some time prior thereto had been, the treasurer of said State; that at that time, and for some time prior thereto, said Vincent had

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been dealing largely with said defendant in buying and selling cotton for future delivery, on his (said Vincent's) private account; that on, to-wit, said 10th day of March, 1881, said Vincent used, of the funds so deposited in said bank to his credit as State treasurer, and belonging to the State as aforesaid, a large sum, to-wit, twenty thousand and one hundred dollars, in the purchase of a certain draft drawn by said Merchants' & Planters' Bank, by Robert Goldthwaite, its cashier, on the Bank of New York National Banking Association, of the city and State of New York, for the sum of twenty thousand dollars, payable to the order of I. H. Vincent, State treasurer,—said words, *State treasurer*, being written on the face of said draft, immediately after the name of said Vincent, and which said draft was the property of said plaintiff; that afterwards, to-wit, on the 10th day of March, 1881, said Vincent delivered said draft to said defendant, and at the same time indorsed it by writing on the back thereof, in substance as follows: '*Pay to the order of Fred. Wolffe,*' and signed said indorsement in substance as follows: '*I. H. Vincent, treasurer;*' that said draft was delivered to and received by said Wolffe in payment of money that had been theretofore, or which might be thereafter, paid out by said Wolffe for or on account of said Vincent in the purchase or sale of cotton for future delivery as aforesaid. And plaintiff avers that, long prior to, and on said 10th day of March, 1881, defendant well knew that said Vincent had been, and still continued to be, and then was the treasurer of the State of Alabama; and plaintiff further avers that on, to-wit, said 10th day of March, 1881, said Wolffe indorsed said draft to E. K. Wright, cashier, or order; and said indorsement by said Wolffe was in substance as follows: '*Pay to E. K. Wright, cashier, or order, for collection and credit for account of Fred. Wolffe, Montgomery, Alabama.*' And plaintiff avers that said E. K. Wright was then the cashier of the National Park Bank, in the city and State of New York; and said draft was afterward, to-wit, on the 15th day of March, 1881, collected by said National Park Bank, for and on account of said Wolffe, from said Bank of New York National Banking Association. And plaintiff avers that neither said Vincent nor said Wolffe ever paid said sum of money to plaintiff, but that the same is still due and unpaid. Wherefore plaintiff sues," &c.

The defendant objected to the allowance of this amendment, and demurred to the complaint as amended, and also to the amended count. The grounds of demurrer to the entire complaint were, in substance, that the special count was in case, or *ex delicto*, while the original complaint was in *assumpsit*, and therefore there was a misjoinder of counts. The special grounds of demurrer to the amended count were: (1.) "The

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facts alleged therein do not show that the defendant knowingly participated in any breach of trust, or that he received any money of the plaintiff on the draft therein mentioned, with knowledge at the time that such money or draft was the money or draft of the plaintiff at the time." (2.) "No such knowledge by the defendant as is essential to create or show a liability on his part to the plaintiff is alleged or stated in said count." (3.) Said special count is a departure from the original complaint. (4.) "Said special count does not aver or state knowledge on the part of the defendant of such facts as were and are essential to show a liability against him in favor of the plaintiff, and does not aver the existence of all the facts which were and are essential to entitle plaintiff to recover under that count." (5.) "The facts alleged in said count do not show that the money deposited by said Pollard was the money of the plaintiff after it was so deposited; nor do the facts alleged show that defendant received said draft, or any money which at the time belonged to the plaintiff, and which the defendant knew at the time belonged to the plaintiff." The court overruled the demurrer, and the defendant then pleaded the general issue; on which plea issue being joined, a trial was had, which resulted in a verdict and judgment for the plaintiff, for \$20,000; and the property on which the attachment had been levied was condemned to the satisfaction of the judgment.

The errors assigned are, the allowance of the amendment, the overruling of the several demurrers, and the final judgment.

RICE & WILEY, for the appellant.—(1.) In ordinary attachment cases, an affidavit is required of the plaintiff, or person suing out the writ, to satisfy the conscience of the officer, and show that a state of facts exists which makes it his duty to issue this extraordinary process.—*Wright v. Smith*, 66 Ala. 546; *Waples on Attachment*, 154, 155. In suits by the State, an affidavit is dispensed with, and the direction of the governor, in writing, is substituted for it.—Code, § 2902. The written authority being the foundation of the action, the record must show its existence, and that it was exhibited to the officer who issued the writ; and not being produced and exhibited to him, nor any where set out in the record, the attachment is void. A plea in abatement, or motion to quash, on account of defects which render the process void, is not necessary.—*Reid & Co. v. McLeod*, 20 Ala. 576; *Cox v. Mangham*, 29 Ala. 81; *Hanson v. Dow*, 51 Maine, 165; *Fitzsimmons v. Howard*, 69 Ala. 590; *Waples on Attachment*, 24, 136, 321. (2.) The special count is in case, and can not be joined with the common counts. *Myers v. Gilbert*, 18 Ala. 467. (3.) But the special count,



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whether in case or in assumpsit, is bad, and shows no cause of action in favor of the plaintiff. The money collected by Pollard, as taxes, belonged to the State, until it was deposited in bank by him to the credit of Vincent as treasurer, whereby its identity was lost and destroyed; and the money afterwards received by defendant was not the money of the State.—*Perley v. County of Muskegon*, 20 Amer. R. 637; *Br. Bank v. Sydnor*, 7 Ala. 308. If the money was wrongfully paid out by Vincent, and wrongfully received by Wolffe, the State might waive the tort, and maintain an action for money had and received; but this would amount to a ratification of the wrongful act, would discharge Vincent from liability, and would require express legislative sanction.—*VanDyke v. The State*, 24 Ala. 81; *The State v. Keim*, 8 Neb. 63; *Burback v. Fay*, 65 N. Y. 57; *Noyes v. The State*, 32 Amer. R. 712; *U. S. v. Smith*, 94 U. S. 217; *Railroad Co. v. Mississippi*, 102 U. S. 140; 13 How. 561; *Bank v. Gibson*, 6 Ala. 814.

THOS. N. McCLELLAN, Attorney-General, with whom was E. W. PETTUS, *contra*.—(1.) The amended (or special) count is in assumpsit, and was properly allowed.—*Wilkinson v. Mosely*, 18 Ala. 288; *Insurance Co. v. Randall*, 74 Ala. 176; *Steed v. McIntyre*, 68 Ala. 408; *Mahan v. Smitherman*, 71 Ala. 563. (2.) The money collected by Pollard, as taxes, belonged to the State, while in his hands, and when deposited in bank to the credit of the treasurer; and its character was not changed, when drawn out on the warrant of the treasurer.—*Skinner v. Merchants' Bank*, 4 Allen, 290; *Rusk v. Newell*, 25 Ill. 225. The facts averred in the special count show knowledge by the defendant of the character of the money as belonging to the State, and the face of the draft was sufficient to charge him with notice.—*Brush v. Ware*, 15 Peters, 114; *Nat. Bank v. Insurance Co.*, 104 U. S. 54; *Shaw v. Spencer*, 100 Mass. 382; *Duncan v. Jordan*, 15 Wallace, 165; *Bodenheim v. Hoskyns*, 2 De G., M. & G. 903; *Pannell v. Hurley*, 2 Collyer, 241; 2 Ball & Beatty, 253; 14 Peters, 518; 31 Conn. 180; *Angle v. Insurance Co.*, 92 U. S. 330; 72 Ala. 585; 20 How. 365. (3.) The State may sue in its own name, and the written direction of the governor is sufficient authority for bringing the action.—Code, § 2902. Having the statutory right to direct the institution of a suit, he must have the implied right to select the form of action in any given case, else the authority would be unavailing. The statute has been enacted since the decision in the case of *VanDyke v. The State*, cited for appellant. But that case, it is submitted, is wrong in principle, and ought not to be extended.

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STONE, C. J.—There is nothing in the objection, that the Attorney-General, when he sued out the attachment, did not exhibit the Governor's written direction that he should do so. Code of 1876, § 2902. Such direction is, at most, the Attorney-General's authority for bringing the suit; and if the direction was not given, the omission should be taken advantage of by motion to dissolve the attachment, made before joining issue.—*Jordan v. Hazard*, 10 Ala. 221; *VanDyke v. The State*, 24 Ala. 81.

Neither is there any thing in the alleged misjoinder of counts. Each count is clearly in assumpsit, the difference being that the count added by way of amendment is a special count, whereas the original complaint contained only common counts. *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170.

The tax-collector of Montgomery county deposited the State tax-money in bank, to the credit of "I. H. Vincent, treasurer." Vincent was then treasurer of the State of Alabama. He checked out twenty thousand dollars of this money, and with it purchased exchange on New York—the draft made payable to the order of "I. H. Vincent, treasurer." Vincent indorsed the draft to Wolffe, signing the indorsement "I. H. Vincent, treasurer." Wolffe knew Vincent was treasurer of the State of Alabama. The draft was collected, and the proceeds placed by Wolffe to Vincent's credit, in payment of an individual indebtedness from the latter to the former. The present suit was brought to recover this, with other sums, from Wolffe; and there was verdict and judgment in favor of the State, for the twenty thousand dollars.

There can be no question, that the word "treasurer," appended to Vincent's name, both as payee and indorser of the draft, was notice enough to put Wolffe on inquiry, which, if prosecuted, would have led to the discovery that the money was not Vincent's, but belonged to the State of Alabama. *Brush v. Ware*, 15 Pet. 93–113; *Duncan v. Jordan*, 15 Wall. 165; *National Bank v. Insurance Co.*, 104 U. S. 54; *Shaw v. Spencer*, 100 Mass. 382; *Pannell v. Hurley*, 2 Coll. 241; *Bodenheim v. Hoskyns*, 2 De Gex, M. & Gordon, 903.

The question of real merit in this case is, whether the State can sue at law for the money, without a previous act of the legislature, ratifying a real or supposed tortious use of the money; or, to state it differently, whether there is any power, other than the legislature, which can waive the tort, and authorize a suit in assumpsit. The inquiry may well arise in this case, what tort is to be waived, or what illegal act to be ratified? We may concede that the tax-collector was without authority for placing the tax-money on deposit in bank, and the treasurer was under no obligation to call for it, or to receive it

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from that depository. We may concede further, that until Vincent checked out the money, it remained the tax-collector's, and was subject to his risk. What was its *status*, after Vincent obtained control of it, by checking it out of bank? Had it not then reached its proper depository and destination? Was it not then the money of the State, in the hands of the proper custodian, the State treasurer? Is the case different from what it would have been, if the money had been sent to the treasurer by a private hand—an irresponsible one, if you please?

The State has need, constantly recurring, of funds in the hands of its fiscal agent, to meet its semi-annual interest payable in New York. There is nothing suspicious, nor out of the usual routine, in the purchase of exchange by the State treasurer with State funds, even for larger amounts than twenty thousand dollars. The illegality is found, not in the receipt of the money by Vincent. He was entitled to it. Not in the purchase of exchange. He had authority to purchase it. It consisted alone in the application of the funds of the State, having the ear-mark of its ownership, to Vincent's individual uses. In this, both Vincent and Wolffe participated, actively and knowingly. The money was trust money in Vincent's hands—bore on its face the impress that it was trust money; Vincent held it as trustee, and by aiding him in its misapplication, Wolffe constituted himself trustee *in invitum*—co-trustee with Vincent, and liable to account for its misappropriation.—*Lee v. Lee*, 67 Ala. 406, and authorities cited, 423; *Milhous v. Dunham*, 78 Ala. 48; *National Bank v. Insurance Co.*, 104 U. S. 54; *Shaw v. Spencer*, 100 Mass. 382; *Skinner v. Merchants' Bank*, 4 Allen, 290; *Cobb v. Wanemaker*, 78 Penn. St. 501.

We again inquire, what act developed in this transaction is it necessary to ratify, or what tort to waive, in order to maintain this suit? This is not the case of an alleged change of the character of the thing claimed, such as the sale of a chattel, and conversion of it into money, or into some other chattel. In such case, there must be a ratification of the unauthorized sale, before the substituted money or article can be claimed; and claiming the money validates the sale, and vests in the purchaser a title to the property converted.—*Butler v. O'Brien*, 5 Ala. 316; *Harrison v. Gardner*, 10 Ala. 185; *Williams v. Jones*, at present term. This requires ratification, which can only be done by competent authority. In this case, there has been no change of the character of the thing claimed. It was money at the beginning; it is still money. Claiming it of Wolffe, is no abandonment of Vincent's liability, any more than suing B, for an alleged second conversion of a chattel previously converted by A, would be an abandonment of all



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claim against A. Each is liable to suit and judgment; and nothing less than satisfaction by one will discharge the other. *Beazley v. Mitchell*, 9 Ala. 780; *Spivey v. Morris*, 18 Ala. 254; *Bott v. McCoy*, 20 Ala. 578; *Hyde v. Noble*, 38 Amer. Dec. 508; *Sessions v. Johnson*, 95 U. S. 347; Wharton on Agency, § 72-2.

The present case is distinguishable from *Van Dyke v. State*, 24 Ala. 81. In that case, the money was paid to a person not authorized to receive it—a mere private agent of the depositors, so far as that service was concerned. The money never reached the hands of the treasurer, and therefore it never became the State's money. What was done did not discharge the tax-debtors, any more than a delivery of the money to any other faithless agent would have discharged them. Van Dyke, though not liable to the State, in the absence of ratification of the payment to him by competent authority, was nevertheless liable to the parties who deposited the money with him. In this case, when Vincent drew the money out of the bank, the tax-collector was *eo instanti* discharged, and at the same time Vincent and his sureties became bound to the State for its faithful administration.

The two cases of *Perley v. County of Muskegon*, 32 Mich. 132 (s. c., 20 Amer. Rep. 637), and *State v. Keim*, 8 Nebr. 63, are not reconcilable with our views, nor are they reconcilable with our former rulings. They ignore the principle, that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself trustee, and must account as trustee.

The case is thus narrowed down to this: Wolfe obtained possession of twenty thousand dollars of the State's money, illegally, charged with knowledge that it was the money of the State, which Vincent had no authority to pay to him on private account. He received it illegally, and holds it tortiously.

There is no matter of account to be settled, for Wolfe could be entitled to no credits against it. The action of assumpsit-money had and received—will lie for its recovery.—1 Brick. Dig. 140, §§ 61, 72, 73; *Hitchcock v. Lukens*, 8 Por. 333; *Vincent v. Rogers*, 30 Ala. 471; s. c., 33 Ala. 224; *Finney v. Cochran*, 37 Amer. Dec. 450; s. c., 1 Watts & Serg. 112.

Affirmed.

CLOPTON, J., not sitting.

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**Doe, ex dem. Hughes v. Anderson.***Ejectment against Purchaser at Tax-Sale.*

1. *Limitation of action.*—Five years is the statutory limitation of an action to recover lands sold for the non-payment of taxes (Code, § 464), and this has been judicially construed to mean five years from the delivery and registration of the deed, properly executed and acknowledged.

2. *Tax-deed as color of title.*—A tax-deed, though invalid as a muniment of title, may give color of title, and operate to fix and define the boundaries of an actual possession.

3. *Adverse possession; continuity of inclosure.*—Possession, such as may ripen into a title under the statute of limitations, must be continuous, and must be evidenced by acts suitable to the character of the lands; and where they consist of open, uninclosed suburban lots, susceptible of cultivation, and are cultivated each year, the continuity of the possession is not destroyed because the fences, when not necessary for the protection of the crops, are suffered to become dilapidated.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by John W. Hughes and the children of Mason Harwell, deceased, against Pelham J. Anderson, and was commenced on the 19th May, 1883. The lands sued for consisted of three lots, Nos. 2, 6, and 7, of block No. 1, of the "Peacock track" of land, adjoining the city of Montgomery on the south-west. The said track of land had belonged to Mrs. Catherine Baker, and was devised by her to Mrs. Eliza Peacock for life, with remainder to her five children, one of whom was William Williamson. Under a special act of the General Assembly, approved Nov. 21, 1863, the lands were sold by the administrator with the will annexed of Mrs. Baker, and the lots in controversy were bought at that sale by said Williamson. Mrs. Peacock died in 1866, and said lots were sold, in 1867, under execution against said Williamson, said Hughes and Harwell becoming the purchasers. This was the plaintiffs' title, and the bill of exceptions adds: "It did not appear that either said Williamson, or those holding under him through said sheriff's sale, had ever been in possession of the lands. The defendant's title was the statute of limitations of five years, under claim of adverse possession, under tax-sales; and the want of title in plaintiff's lessors was also a ground of defense."

"On the trial," as the bill of exceptions states, "the evi-

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dence showed that two of the lots sued for (Nos. 2 and 6), and nine-tenths of the third (No. 7), were sold in 1871 and 1872 for the non-payment of taxes, and were purchased by the defendant (Anderson), to whom deeds were made by the judge of probate in 1873 and 1874, which deeds were duly recorded within twelve months after their date. There was evidence tending to show that the defendant had been in actual adverse holding and possession of the lots sued for, for the full period of five years before the commencement of this suit, by inclosing and farming on the same by his tenants. But there was, also, evidence tending to show that said lots were open and uninclosed, lying in the vicinity of the city of Montgomery, were suitable for cultivation, and without any improvements thereon at the date of said sales for taxes; and the plaintiffs' evidence tended to show, also, that no inclosure of said lots was made, or any cultivation of them had, or any improvements put upon them, five years before the commencement of this suit. There was, also, evidence tending to show that the defendant's occupancy and holding of said lots, after the same commenced, was by renting the same to tenants who lived near by, who engaged to fence the same, and did fence the same, and cultivate crops thereon; that the first fence placed on or around said lots was of a very inferior and unsubstantial nature, being of small willow poles, some of them tied with bark to posts of the same materials; that this was erected in the spring of the year, and was entirely gone in a few months thereafter, being taken away, and not replaced until the next spring; that this occurred for several successive years; that the land was open, on the removal of the fence, and without any improvements upon it; and that this period, during which the fence was destroyed or removed and replaced the next spring, was a part of the period necessary to make out the five years under the statute of limitations. The evidence upon this point was, that the first fence was put up in the spring of the year, the witnesses differing as to the particular year; that the lands were plowed up, and a crop planted on them. The plaintiffs' witnesses testified, that the fence was pretty much all gone by August of that year, and the cattle were on the crops; while the defendant's witnesses testified, that the fence was destroyed after the crops were gathered in the fall, and at no time was it entirely taken away; but all the witnesses agreed that the inclosure was restored the next spring, in time to prepare the land for a crop. As to the removal of the fence, the testimony was only as to the eastern side of the lots."

A witness for the defendant, who had done some work for the defendant's tenants on the land, "and who had no interest in the suit," testified as to the time when the fence was first



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erected, and refreshed his memory by using a memorandum-book, the entries in which were made, he said, at the dates specified; but there was evidence on the part of the plaintiffs, by experts, tending to show that the dates had been changed.

The plaintiffs asked the following charges in writing, which were refused by the court, and exceptions duly reserved to their refusal:

"1. If any witness in this case has shown deliberate corruption in his testimony, without any apparent interest in the controversy, it is the province and duty of the jury, if possible, to attribute the source of the corruption to where reason and common experience would place it; and if it is thus traced to either of the parties to this suit, the jury should regard with doubt and suspicion all the evidence of such party; and it is the experience of mankind, and an ordinary rule of human conduct, that a person will not, without some motive of cupidity or revenge, deliberately perjure himself, when he has no interest in the controversy.

"2. If the jury believe, from the evidence, that one-tenth of lot No. 7 was not sold to Anderson, and that he had no deed to said one-tenth, and that his possession of the premises was overt and notorious, and of such a nature as, of itself, to give notice to the co-tenants, plaintiffs, that an adverse possession and actual disseizin was intended to be asserted against them; then the statute of limitations of five years would not avail as a defense to lot No. 7.

"3. If, after the crop is gathered, the fences are removed, and the land turned out as a common, having [leaving?] nothing on it to indicate an adverse possession, there is a break in the continuity of possession, no matter what may have been the intention about returning into possession."

The court gave the following charges at the instance of the defendant, exceptions to each being duly reserved by the plaintiffs:

1. "If the jury believe that the judge of probate of Montgomery county executed the deeds read in evidence, conveying to the defendants lots Nos. 2 and 6 and nine-tenths of No. 7, here sued for; and that said deeds were delivered to said defendant, and recorded in the office of said probate judge, as certified on the back of said deeds; and that the defendant, more than five years before the commencement of this suit, rented out said lands; and that the tenants to whom he rented them, occupied and cultivated them as his tenants; and if they further believe that said Anderson continued to rent out said lands, for every year thereafter, up to the commencement of this suit, and that his said tenants occupied and cultivated said land each of said years; then the jury must find a verdict for

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defendant for said lots Nos. 2 and 6, and for nine-tenths of lot No. 7."

2. "Although the jury may believe that the plaintiffs' testimony shows that a fence was erected around lot No. 2 in the spring of 1878, this would not justify them in finding that the testimony of the witnesses who swore that a fence was erected around said lots the year before was untrue, if they can reconcile that fact with the truthfulness of the defendant's testimony."

3. "The were fact that some witnesses swore that the lots were inclosed in 1878, does not prove that the witnesses who swore they were inclosed the year before, swore falsely. It is the duty of the jury to reconcile the testimony of the witnesses, if it can be done, and not to impute falsehood to any of them; and, for this purpose, thy should look at the means of the witness for knowing the fact, if such is the fact, that the fence was several times removed during the fall and winter, and restored in the spring, and all the other circumstances in evidence."

4. "If the jury believe, from the evidence, that Anderson rented out the lands as farm lands, and that they were cultivated and planted as such during each of the years they were so rented; then the mere fact that the tenants, or any other persons, removed or destroyed the fences on one side of said lots, during the latter part of the year, and restored the same in the succeeding spring, can not be held to be an abandonment of his possession, so as to make a break in its continuity, when there is no evidence that, during the time, any other person took possession of said lands."

5. "If the jury believe, from the evidence, that Anderson rented out the said lots more than five years before the commencement of this action, and continued to rent them out each year, claiming them as his own; and if they further believe that said tenants, to whom Anderson rented said lots, inclosed and cultivated them during each of said years; then that will constitute such a continuous adverse possession of such lots as is sufficient to bar the plaintiffs' right to recover said lots in this action, although the jury may believe that the fence on one side of the lots was destroyed and removed once or twice during the fall or winter, and was restored during each succeeding spring."

6. "The mere fact, if it be a fact, that the fence on one side of the lots was permitted to be destroyed and removed during each year, but was restored each succeeding spring, will not break the continuity of the adverse possession, if the jury believe that the lands were unimproved, and were used as farming lands, and that a crop was planted on said lands during

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each of said years, and that they were cultivated as a farm during each of said years.

7. "If the jury believe, from the evidence, that Anderson rented out lot No. 2, more than five years before the commencement of this suit; and that his tenants inclosed said lot, or the greater part of it, and cultivated it; and that he continued to rent it out every year, from that year up to the commencement of this suit; and that his said tenants occupied and cultivated said lot during said years; then that is such a continued possession of said lot as will constitute an adverse possession, and will bar plaintiffs' right to recover said lot, although the jury may believe that the inclosure around the lot was removed every fall or winter, and restored every spring."

The several charges given, and the refusal of the several charges asked, are now assigned as error.

GUNTER & BLAKEY, for the appellants. — (1.) The first charge asked and refused, invoking and applying the principle, *Falsus in uno falsus in omnibus*, asserted a correct proposition, and was justified by the evidence. (2.) One-tenth of lot No. 7 had never been sold for taxes, and the defendant's deeds did not purport to convey it. As to one-tenth interest, there was no disseizin, and the rightful owners were tenants in common with the purchaser at tax-sale. Besides, there was no disclaimer as to this interest, and therefore the defense failed as to the whole lot.—1 Chitty's Pl. 567, 16th Amer. ed. (3.) Several rulings of the court, in the matter of charges given and refused, assert the proposition, that the continuity of an adverse possession is not broken by the destruction of fences in the fall or winter, leaving no visible marks of an actual possession, provided the holder intends to return, and does return and rebuild his fences in the spring. No authority can be found for this proposition, and it is at variance with the whole doctrine of adverse possession, converting a series of distinct trespasses into a continuous possession, and ripening into a title by lapse of time.

TROY, TOMPKINS & LONDON, *contra*.—The defendant's tax-deed was duly executed and recorded, and was at least color of title to the lots described therein. Having taken possession under this deed, and rented out the lands, which were only suitable for farming purposes, the continuity of the possession was not broken by the dilapidated condition in which the fences were suffered to fall when not necessary to protect the crop, if being shown that they were renewed each spring. *Royall v. Lisle*, 15 Geo. 545; *Jones v. Randle*, 68 Ala. 258; *Pugh v. Youngblood*, 69 Ala. 296; *Farley v. Smith*, 39 Ala. 38.



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SOMERVILLE, J.—The main point contended for by appellants' counsel arises under charges given and refused by the court, touching the defense of the statute of limitations, and the character of the possession by an adverse occupant of land necessary to make it continuous and uninterrupted.

The defendant is shown to have taken possession of the premises sued for under tax-deeds executed by the probate judge of Montgomery county, in the years 1873 and 1874. This action was commenced in May, 1883.

The period of limitation fixed by statute, for the recovery of real property sold for the non-payment of taxes, is five years after date of sale.—Code, 1876, § 464. This has been construed to mean five years from the date of the delivery and the recording of the deed, after being properly executed and acknowledged.—Code, § 460; *Bolling v. Smith*, at present term; *Pugh v. Youngblood*, 69 Ala. 296; *Lassiter v. Lee*, 68 Ala. 287; *Jones v. Randle*, *Ib.* 258.

There is no contention that the tax-deeds were valid, or such as to have conveyed a good and perfect title to the premises, but they are relied on only to give color of title. That they were admissible for this purpose, is not denied; for the rule is settled, that a tax-deed, though invalid, may nevertheless constitute color of title, and thus operate to define the boundaries of an actual possession by an occupant.—*Stovall v. Fowler*, 72 Ala. 77; *Pugh v. Youngblood*, *supra*.

It is shown, conceding that this is necessary, that the possession of the defendant was adverse, open, and notorious in its character; and this would be sufficient to bar the action, provided it was continuous or unbroken for the requisite five years. The premises in controversy were suburban lots, and, at the time defendant purchased them, were open and uninclosed, and without improvements on them. They were suitable for cultivation, however, and the possession of the defendant was confined to a cultivation by his tenants, who raised crops on the lots annually from year to year. These tenants constructed an inferior fence around the lots, which seems to have been sufficient for their purposes; but, during one or more years, it became dilapidated, and was partially destroyed between the time for gathering the crops and the ensuing spring, when it was again renewed.

The proposition involved in the contention of the appellant is, in substance, that the temporary destruction of the fence broke the continuity of the defendant's possession, so as to destroy its adverse character, although there may have been no intention or purpose of abandonment, but an accompanying intention to renew the inclosure when necessity should require it. In other words, that permitting a fence to be destroyed,

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or to get out of repair, for a period of the year when it is not needed to protect the crops, *per se* constitutes abandonment. This is clearly not the law.

A fence or inclosure is not an essential element of adverse possession, but is only one of many acts indicative of possession and claim of ownership. It is often very important, it is true, to mark with precision the limits or boundaries of a possession, especially when the occupant is without color of title, which would answer this purpose. In a section of the country, for example, where fence-laws have been abolished, the absence of an inclosure would weigh but little. So, where a river constitutes a boundary line. The reason is, that it would then be no index of an intention to abandon. It has often been decided in this country, that the possession of an occupant may be adverse without either inclosure or improvements. *Bell v. Denson*, 56 Ala. 444; *Ellicott v. Pearl*, 10 Pet. (U. S.) 441; *Leeper v. Baker*, 68 Mo. 400; Angell on Limitations, § 400; Real Prop. Trials, (Malone) §§ 277-8. And color of title is sometimes said to be a substitute for a substantial and permanent fence around the premises claimed.—Trial of Titles to Land (Sedg. & Wait), § 767; *Watson v. Mancill*, 76 Ala. 600.

As said by this court in *Bell v. Denson*, *supra*, "the possession must be by acts suitable to the land." In *Clement v. Perry*, 34 Iowa, 564, the settled rule is declared to be, that "where a person claiming land exercises acts of ownership of it, by the use of it for the purposes to which it is adapted," he is in such actual occupancy of it as will bar a recovery after the lapse of the statutory time—that "such possession is as actual as that by inclosure." When land is suitable for farming purposes only, a sufficient actual adverse possession may be obtained by using it for this purpose, openly and notoriously, without break from year to year, although the cultivation be only during the season customary for raising crops. A person must be blind, or else very negligent indeed, who would fail to notice the open cultivation of his land from year to year, the growing of crops upon them, and the gathering and taking of them away, to say nothing of the lasting marks of this industry left permanently behind. *A fortiori* is this true with color of title.

It is plain that, when once an adverse possession has been established, it can be broken only in one of three ways: (1) by the act of the real owner; (2) by the intrusion of a stranger; (3) by the abandonment of the premises by the occupant himself. Whether any act constitute an abandonment, especially if it be equivocal in its nature, is necessarily a question of fact determinable by intention—not a secret or clandestine inten-

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tion, but one communicated and made manifest by cotemporaneous circumstances, or subsequent acts. It was on this principle that it was held by the Supreme Court of Missouri, that "every failure to cultivate a field for a season, or a delay in repairing the fence when destroyed, will not be held to be an abandonment, if a sufficient reason appears."—Trial of Titles to Land (S. & W.) §§ 737-744; *Crispen v. Hannavan*, 50 Mo. 550; *Draper v. Short*, 25 Mo. 196.

The charges of the court touching this subject were free from error.

The first charge requested by the appellant was properly refused. It ignored all consideration of the rule, that although a witness may testify corruptly, his testimony should nevertheless be received as credible, so far as it may be satisfactorily corroborated by other evidence.

The second charge was misleading. Conceding that the plaintiff was entitled to recover one-tenth of lot number 7, and that the adverse possession as to this was insufficient, the defense may nevertheless have been good as to the remaining nine-tenths of the lot, included in the defendant's tax-deeds.

We discover no error in any of the rulings of the court, and the judgment is affirmed.

## East Tenn., Va. & Ga. Railroad Co. v. Deaver.

### *Action against Railroad Company, for Injuries to Sheep.*

1. *Statutory liability of railroad company, for injuries to cattle; burden of proof.*—Under statutory provisions (Code, §§ 1699, 1700), the failure of a railroad engineer to comply with statutory requirements is negligence *per se*, and renders the railroad company liable for all damages resulting from such failure; and in an action to recover damages for cattle killed or injured, the *onus* is on the railroad company to prove a compliance with all statutory requirements.

2. *Statutory duty of engineer at public road crossing.*—A railroad engineer is required to "blow the whistle, or ring the bell, at least one-fourth of a mile before reaching any public road crossing, . . . and continue to blow such whistle, or ring such bell, at intervals, until he passes such road crossing" (Code, § 1699); but, while a charge is erroneous which makes it his duty to blow the whistle, omitting the alternative (as to ringing the bell), the error is without injury to the defendant, when it appears that the bell was not rung at any time.

3. *Same; speed of train, by statute, and at common law.*—The engineer is also required, "before entering any curve crossed by a public road on a cut, where he can not see at least one-fourth of a mile ahead," to



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reduce the speed of his train, and "approach and pass such crossing in such cut at such moderate speed as to prevent accident in the event of an obstruction at the crossing" (Code, § 1699); but the statute only applies to such crossings as are particularly described, and leaves his duty at other crossings to be determined by the common law.

4. *Same.*—In cases not governed by statutory regulations, the rate of speed at which a train of cars may approach and pass a public road crossing is not governed by any fixed and definite rule, but is somewhat dependent on the locality and the attendant circumstances; and a charge is erroneous which makes it the duty of the engineer, on approaching a crossing, to diminish the speed of his train, without regard to the attendant circumstances.

5. *Diligence required in case of obstructions on road.*—An engineer is also required, "on perceiving any obstruction on the track of the road," to "use all means within his power, known to skillful engineers, in order to stop the train;" but this duty is not absolute, and does not require that the peril of passengers shall be increased, when the obstruction is not perceived until too late to stop the train with safety; though there may have been antecedent negligence, and consequent liability incurred, by the failure to keep a proper lookout, whereby the obstruction might have been sooner discovered.

6. *Charge on part of evidence.*—When witnesses are examined by both parties, and testify to material facts, all the facts and circumstances should be submitted to the jury; and a charge which selects one witness, gives his testimony undue prominence, and indicates to the jury that they may look to it alone, is properly refused.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Francis M. Deaver, against the appellant, a foreign corporation operating the Memphis and Charleston railroad under a lease, to recover damages on account of injuries to a flock of sheep belonging to plaintiff, about fifteen of which were killed, and ten more seriously injured, by a train of the defendant's cars; and was commenced on the 1st August, 1883. The defendant pleaded the general issue, with leave to give in evidence any matter that would be good if specially pleaded; and the cause was tried on issue joined on that plea. The bill of exceptions purports to set out all the evidence, but it is not necessary to state it at length. The accident occurred about day-break, on the morning of May 8th, 1883, when the defendant's train was running, as the engineer testified, on schedule time, at the rate of about twenty-five miles per hour; and at a public road crossing. Near this crossing, on the south side of the railroad, there was a large pond, at which the sheep were in the habit of drinking. They also were in the habit of grazing along the railroad, which was uninclosed on each side, and along the public road, which was uninclosed on the west side. One Willingham, a "section-boss" of the defendant's road, who was examined as a witness for the defendant, testified: "The railroad curves beyond said public road, and there is a cut about four hundred yards west of it; and the engineer, from about two hundred and fifty

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yards this side, could see an obstruction on the track at the public road crossing." Thomas Kincella, the engineer in charge of the train, was also examined as a witness for the defendant, and thus testified: "I blew the whistle for the crossing at the regular place where the whistling post is, between five and six hundred yards from the crossing, and where I am required by the rules of the company to blow it. The signal was two long, and two short whistles. After giving the signals, I did not blow the whistle, nor ring the bell, at intervals, nor at all again, until I gave the cattle-alarm; and this I gave when I discovered that a sheep had approached, and gotten on the track about forty yards ahead. The cut is four hundred yards from the crossing, and you can see the crossing at least three hundred yards from the cut. When I first saw the sheep, I was about eighty yards from them, and they were down by the pond grazing, about thirty or forty feet from the track. I saw one of them approach the track, and I was about forty yards from him as he got on it. I sounded the cattle-alarm, and they run up immediately, right on the track, some of them knocking themselves against the side of the engine, and some of them being carried forward on the pilot of the engine beyond the crossing. At the speed the train was then running, I could not have stopped it, by the use of all the appliances at my command, which were of the best description, in less than two hundred yards. I did not have time to do more than give the cattle-alarm, before the engine was on them. It was impossible to use any means to avert the accident."

The court gave the following (with other) charges to the jury, to each of which the defendant excepted: (1.) "The statute requires that a railroad engineer, when he approaches a public road which crosses the railroad, and when within not less than one-fourth of a mile of such crossing, must blow the whistle, and must continue to blow the whistle, or ring the bell, at intervals, until the train passes such crossing; and his failure to do this is such negligence as is condemned by the statute." (2.) "When the engineer perceives an object on the track, he must reverse the engine, apply the brakes, and do every thing known to skillful engineers to prevent the striking of the object; and the failure on his part to do all these things, is declared by the statute to be negligence." (3.) "When a railroad train is approaching a public crossing, it is the duty of the engineer, or other person in charge thereof, not only to give the warnings of the approach of the train, but the speed of the train must be slackened, so that it would be more manageable, and collisions with persons or property crossing the track may be more easily avoided; and if he fails to do this, he is guilty

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of negligence, and liable for injuries to property resulting therefrom."

The defendant requested the following charges to the jury: (1.) "If the jury believe the evidence, they must find for the defendant." (2.) "If the jury believe the evidence of the engineer to be true, they are bound to render a verdict in favor of the defendant." (3.) "The engineer in this case not having been impeached, the presumption is that he has sworn the truth; and if the jury find that his evidence is true, they must return a verdict for the defendant." The court refused each of these charges, and the defendant excepted to their refusal.

The charges given, and the refusal of the charges asked, with other matters, are now assigned as error.

HUMES, GORDON & SHEFFEY, for appellant.

JAMES JACKSON, *contra*.

CLOPTON, J.—By section 1699 of the Code, it is mandatory upon the engineer, or other person having the control of the running of a locomotive on any railroad in this State, to blow the whistle, or ring the bell, at least one-fourth of a mile before reaching any public road-crossing, and to continue to blow the whistle, or ring the bell, at intervals, until the crossing is passed. By section 1700, the company is made liable for all damages done to stock or other property resulting from a failure to comply with the statutory requirements, or from any negligence on the part of such company or its agents. When any stock is killed or injured by the locomotive or cars of any railroad, the burden is on the company to show that the requirements of the statute were complied with. The omission to do the specified acts, at the specified times and places, constitutes, by virtue of the statute, negligence *per se*, and renders the company liable for all damages resulting from a failure to comply with the statutory requirements; the statute creating the presumption, that any damages sustained is in consequence of such failure, and casting on the company the burden of disproof.—*McAlpine v. Ala. G. So. R. R. Co.*, at present term.

The charge of the court, relating to these duties, instructed the jury, that it was the duty of the engineer to *blow the whistle* at not less than one-fourth of a mile from the crossing, and to continue to blow the whistle, or ring the bell, at intervals, until the crossing is passed. In this there is error. The engineer complies with the statutory duty, if he either blows the whistle or *rings the bell*, and continues to do so at intervals, until he passes the crossing. The error, however, being with-



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out injury, will not work a reversal; as it appears that the engineer did not ring the bell at any time.

The statute does not profess to regulate the rate of speed, at which a train shall be run when approaching a crossing, not in a town or city, except in one case. The engineer is required to blow the whistle, or ring the bell, before entering any curve crossed by a public road on a cut, when he can not see at least one fourth of a mile ahead, and to approach such crossing in such cut at such moderate rate of speed as to prevent accident in the event of an obstruction at the crossing. In *Mo. & Mont. Railway Co. v. Blakely*, *supra*, speaking of this provision of the statute, it is said: "To come within this clause, there must be a *curve crossed* by a *public road* on a *cut*, so that the *crossing*, and any *obstruction* upon it, can not be seen a *fourth of a mile ahead*." It appears from the record that the public crossing in question does not cross a curve on a cut. Therefore, the statutory regulation is inapplicable. Whether the charge of the court, in respect to the rate of speed at which a train must approach a public crossing, *not across a curve*, asserts a correct legal proposition, must be determined by other than statutory rules.—*East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 77 Ala. 429.

In *M. & C. R. R. Co. v. Lyon*, 62 Ala. 71, it is stated as a general rule, that due care is not observed, when a train is running at such speed, that it can not be stopped within the limit at which the engineer can plainly see upon a *straight* track an obstruction thereon, which is reasonably discoverable. In that case, the obstruction was a mule, situated in a culvert, so that it could not be seen until the locomotive was within thirty yards of it; and the train could not be stopped in less than forty yards. It was held, that the circuit judge erred in declaring, as matter of law, that it was negligence to run a train at a speed, from which the engineer could not bring it to a stand-still, within the distance at which he could, under the circumstances, see the mule. Neither the statute, nor the common law, has undertaken to lay down any fixed or definite rule applicable to all public crossings. The current of authority is, that no rate of speed, reasonably necessary to accomplish the purpose of rapid transportation of freight and passengers, and to make the usual and regular connections, amounts to negligence *per se*; due care and caution for the safety of the passengers and freight transported being observed.—*Telfer v. Northern R. R. Co.*, 1 Vroom, 188; *Maher v. At. & Pr. R. R. Co.*, 64 Mo. 267; *Grows v. Maine Cent. R. R. Co.*, 67 Me. 100; *McConkey v. Chi., B. & Q. R. R. Co.*, 40 Iowa, 205; *Chi., B. & Q. R. R. Co. v. Lee*, 68 Ill. 576;

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*Shear. & Red. Neg.* § 478; *Han. & St. Jos. R. R. Co. v. Young*, 19 Am. & Eng. R. R. Cas., 512.

But the rate of speed may become negligence by co-operation of attendant circumstances, and the locality of the crossing. What would be the observance of due care and caution on approaching and passing a public crossing in the open country, would not be such when running through the streets of a town or village, or in passing thoroughfares of frequent travel.—*R. & C. R. R. Co. v. Ritchie*, 19 Am. & Eng. R. R. Cas., 267; *L., Cin. & Lex. R. R. Co. v. Gooty*, 14 Am. & Eng. R. R. Cas., 627. Subject to these, and similar limitations and restrictions, and to statutory regulations, the company may determine the schedule rate at which its trains may be run. The statute (Code, § 1801) confers on incorporated town and cities the power to restrict the running of trains through the limits thereof to a rate of speed not exceeding four miles per hour; and, as we have said, the statute makes it the legal duty of the engineer to run at such moderate speed as to prevent accident, where a public road crosses a curve on a cut. As to other public crossings, the legislature deemed the statutory cautionary signals sufficient to insure the safety of passing persons and animals. The court erred in instructing the jury, that it was the legal duty of the engineer to diminish the speed of the train, irrespective of the circumstances, and the character of the locality.

In *East Tenn., Va. & Ga. R. R. Co. v. Bayliss*, 75 Ala. 466, and 77 Ala. 429, we had occasion to consider the construction of the clause of the statute, which requires the engineer, on perceiving any obstruction on the track, to use all means within his power, known to skillful engineers,—such as the application of the brakes and reversal of the engine,—to stop the train. We held that, if without fault of the employees, a danger is not, and can not be discovered by due watchfulness, until the use of all appliances known to skillful engineers is clearly powerless to avert the injury by stopping the train, the failure to use such means imposes no liability. The statutory duty does not arise, unless and until an obstruction on the road is discovered, though the employees may be at fault and guilty of negligence in not sooner discovering the obstruction. In such case, the company is not liable for the failure in endeavoring to stop the train; but for the negligence which lies back in not discovering the danger in time, if it could have been reasonably done. If the testimony of the engineer be believed, who is the only witness who testifies to the acts at the time of the injury, the train could not have been stopped or checked, when the obstruction was first discovered, so as to prevent the injury. The charge of the court, in respect to this subject,

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withdrew the credibility of the witness, and the facts testified to by him, from the consideration of the jury. The legal effect of the charge, when referred to the evidence, is to instruct the jury, that it was the duty of the engineer, on discovering that a sheep had got on the track about forty yards ahead of the train, to apply the brakes, reverse the engine, and use all means known to skillful engineers to stop the train, though it may clearly have been an attempt of the impossible; and though the peril of the passengers on the train might thereby be increased. Instructions should be framed in reference to the evidence, and should state the law applicable to every aspect or theory of the case, reasonably presented by the proof, if the evidence relating thereto is believed.—*Woodward v. State*, 69 Ala. 242. The consideration of the jury should have been directed to the inquiries, whether the injury could have been averted by the performance of the statutory duties, on discovering the obstruction; and if not, whether, by reasonable diligence and look-out, the sheep could have been discovered in time to have avoided the accident. Neither of these subjects of inquiry was submitted to the consideration of the jury.

The court did not err in refusing the charges requested by the defendant. It appearing that the engineer did not blow the whistle, nor ring the bell, at intervals, until the crossing was passed, and there being no evidence offered by the defendant, showing that the sheep could not have been discovered in time to have averted the accident by the use of proper diligence, the court could not have properly given the affirmative charge in favor of the defendant. And where witnesses are examined on behalf of both parties, a charge is improper, which selects one witness, and gives his testimony undue prominence, by indicating to the jury that they may look to his evidence, disconnected from the other evidence, and find a verdict thereon. The facts testified to by the witness may be hypothetically stated, and the jury instructed what should be their verdict, if from the whole evidence they find such to be the facts. All the facts and circumstances, which there is evidence tending to show, should be submitted to the consideration of the jury.—*Jordan v. Pickett*, 78 Ala. 331.

If it were conceded, that the refusal of the court to permit the defendant to prove by the witness Newsum that he purchased sheep from Johnson in 1882, and the prices at which he purchased them, is erroneous, the error is without injury; inasmuch as the witness testified, that he did not know whether Johnson owned any sheep in 1882, and that he had not bought any from him in several years.

Reversed and remanded.



## Carter v. Chambers.

### *Action for Damages on account of Personal Injuries, against Owner of Private Carriage.*

1. *Charge on oral testimony; when invading province of jury.*—The credibility of oral testimony being a question for the decision of the jury, a charge is erroneous which assumes, or states as fact, any material matter which depends on the sufficiency of oral testimony for its establishment; yet, where the record affirmatively shows that certain facts were admitted, or were clearly proved and not disputed, they may be stated without hypothesis.

2. *Construction of charges in connection with evidence.*—Charges to the jury must be construed in connection with the evidence; and if a charge, when so construed, is free from error, though it assert a rule which, when applied to a different state of proof, would not be correct, it is no ground of reversal.

3. *Negligence, as cause of action or defense.*—Negligence, whether as a cause of action or as a defense, must be the proximate cause of the injury complained of; and when contributory negligence is set up as a defense, it is an admission of negligence on the part of the defendant himself.

4. *Diligence in driving carriage.*—Diligence is a relative term, and has not always the same measure; and a charge which instructs the jury that, ordinarily, the law requires the same diligence from the driver of a carriage and a person on foot in a public street, is erroneous.

5. *Charge as to witness swearing falsely; not authorized by mere conflict in testimony.*—A mere conflict in the testimony—as where one witness testifies that he heard one of the parties make a certain declaration, while others, also present at the time, testify that they did not hear it—does not authorize a charge to the jury as to the effect to be given to the testimony of a witness who has sworn falsely in one particular.

6. *Presumption against party failing to produce witness.*—A party is not bound to produce all the witnesses who may know something about the transactions involved in the issues, nor is any presumption indulged against him on account of his failure to produce them; though, when a witness possesses peculiar knowledge, supposed to be favorable to the party who can produce him, the failure to produce him, if unexplained, is ground of suspicion against that party.

7. *Charge objectionable for generality, confusing, or misleading.*—A charge which, as applied to the particular case, is correct, though asserting a general principle too broadly, or which has a tendency to confuse or mislead the jury, may properly be refused; but, if given, it is not a reversible error.

8. *Ambiguous charge.*—When a charge asked and refused is ambiguous, or susceptible of two constructions, that construction will be adopted which is least favorable to the party asking it.

9. *Negligence in driving carriage.*—It can not be asserted, as matter of law, that driving a carriage rapidly through a public street is, *per se*, culpable negligence.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JAMES E. COBB.

[Carter v. Chambers.]

This action was brought by Robert Carter against W. L. Chambers, to recover damages for personal injuries sustained by plaintiff by being run over, on a public street in the city of Montgomery, by the horses attached to the defendant's private carriage, which was driven at the time by the defendant's servant; and was commenced on the 18th May, 1885. The accident occurred on the 23d December, 1884, under the circumstances stated in the opinion of the court. The record does not show what pleas were filed. The bill of exceptions purports to set out "substantially all the evidence," the most material parts of which are also stated in the opinion of the court. There was, also, evidence showing the extent of the plaintiff's injury; and that he was a planter, residing in the country, and about sixty-five years old. The driver of the defendant's carriage was summoned as a witness for him, and was sworn and put under the rule; but he was not introduced as a witness. The defendant submitted an affidavit as to the testimony of an absent witness, who was present immediately after the accident occurred, and who, as stated in the affidavit, would testify that the plaintiff, in reply to suggestions by the by-standers to go after the negro driver, said, "Let him alone, I was about as much to blame as he was;" and plaintiff admitted, that said witness, if present, would so testify. Other witnesses, who were present at the time, and who were introduced by the plaintiff, testified that they did not hear plaintiff make any such declaration.

The plaintiff asked the following charges in writing, and duly excepted to the refusal of each:

"1. It is the duty of the driver of a carriage, when driving through the streets of a city, to keep his eyes open, and to see; and if in his power, to avoid a collision with any person in the street; and if he did not keep his eyes open, and did not see, when he could have seen, this is negligence in the driver; and if he was driving rapidly through the street, this was culpable negligence; and if the collision with the plaintiff was brought about by such negligence of the driver, without fault, at the time, of plaintiff, then the plaintiff is entitled to recover.

"2. If a party has a witness within his power to produce, and fails to produce him, the presumption is fair, that the witness, if produced, would not support the right of the party.

"3. If a party introduce a falsehood into his case, this may cast suspicion or distrust of all other evidence introduced by that party.

"4. If the facts and circumstances show that the driver of the defendant's carriage was driving rapidly through the street, and did not use his senses to discover a foot passenger in the street, and, in consequence of such failure to use ordi-

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nary care, an injury to the plaintiff occurred, then the defendant is responsible for such damages as have resulted to plaintiff.

"6. If the jury find from the evidence, facts and circumstances proven, that the plaintiff received great bodily injury, and suffered great pain and suffering from the negligent driving of the defendant's carriage in the streets of Montgomery, said driver being then engaged in his master's business, then the plaintiff is entitled to recover in this action.

"7. If the plaintiff was negligent himself, yet, if the injury to him was brought about by the carelessness or negligence of the defendant's carriage-driver, engaged in the defendant's business, then the plaintiff is entitled to recover."

After the jury had retired to consider of their verdict, they came back into the court-room, and asked the court this question: "Is there a greater diligence required of a driver of a carriage in driving in the public streets or roads, than there is in a foot passenger in crossing a public street or road." In response to this inquiry, the court then instructed the jury, "that, ordinarily, the diligence required by law of a driver of a carriage, in driving in the public streets or road, and a foot passenger in crossing a public street or road, was equal; and that, under ordinary circumstances, the law required no greater diligence of the one than of the other." To this charge the plaintiff excepted.

The charge given, and the refusal of the charges asked, are now assigned as error.

W. L. BRAGG, and WATTS & SON, for appellant.—(1.) As to what is negligence, see Beach on Negligence, 195, § 63; *Plummer v. Railroad Co.*, 73 Maine, 591. (2.) The negligence of the plaintiff does not excuse the defendant, when the injury might have been avoided by the use of ordinary care and caution on the part of the defendant's driver.—Beach Neg., 197, § 64. (3.) When the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only the remote cause, or a mere condition of it, the plaintiff may recover.—Wharton on Negligence, § 324; Beach Neg., 58, § 18; Cooley on Torts, 675, 679; Thompson on Negligence, 1151, 1157; *Foster v. Holly*, 38 Ala. 76; *Tanner v. Railroad Co.*, 60 Ala. 637. (4.) Carter's being in the street, and crossing at the time he was struck, without being on the lookout for carriages, was, at most, a mere condition of negligence, and was not, in any legal sense, the proximate cause of his being run over by the carriage. After he had got out into the street, and was starting across, he did look up and down the street, and saw no vehicle in sight; and he was not required to keep



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continually watching, having a right to expect ordinary prudence from the driver of any approaching carriage.—Thompson on Negligence, 406-07; *Robinson v. Railroad Co.*, 48 Cal. 421; *Harpeth v. Curtis*, 1 E. D. Smith, 80. (5.) Carter was not bound to anticipate culpable negligence on the part of the defendant's driver.—Shear. & Redfield on Negligence, 31; *Robinson v. Railroad Co.*, 48 Cal. 421. (8.) The plaintiff may recover, although his negligence remotely contributed to the accident, if, notwithstanding such remote negligence, the defendant might have avoided the injury by the exercise of ordinary care.—Thompson on Negligence, 383, 1151, 1152; *Doggett v. Railroad*, 78 N. C. 305; *State v. Manchester R. Co.*, 52 N. H. 528; *Isbell v. N. Y. & N. H. Railroad Co.*, 27 Conn. 404. (7.) The driver of a team, when approaching a crossing, must be more alert in looking out for foot-passengers, and must drive slowly, cautiously, and carefully. 1 Thompson on Negligence, 387, and authorities cited. It is not unlawful for a pedestrian to cross the street at a place other than the regular crossing (*Cottrell v. Starkey*, 8 Car. & P. 691); and if, while so crossing, he is negligently run down by a driver, failing to look ahead, the driver or his master is liable in damages.—Beach Contr. Neg., 279, § 82, and authorities; Thomp. Neg. 387; *Shea v. Reemes*, 36 La. Ann. 969. (8.) To drive rapidly in a public street of a city, is culpable negligence.—Whar. Neg., §§ 820-26; Shear. & Redf. Neg., §§ 303-05, 360, 314; *Matson v. Maupin*, 75 Ala. 312. (9.) The law gives a right of action for an injury to the person or property, caused directly or consequentially by the negligence, inadvertence, or want of proper care or precaution on the part of another; and the fact that the injury was unintentional is no defense.—*Walker v. Bolling*, 22 Ala. 294; 4 Wait's Ac. & Defenses, 717. (10.) Persons lawfully using a public street owe to each other the duty of ordinary and reasonable care, and each is justified in assuming that the other will so act.—*Murley v. Roche*, 130 Mass. 830; *Baker v. Fehr*, 97 Penn. St. 70; *Dunham v. Rackliff*, 71 Maine, 345; *Wrinn v. Jones*, 111 Mass. 360; *Daniels v. Clegg*, 28 Mich. 32. (11.) The legal right of foot-passengers and drivers of horses, to use a carriage-way of a street for purposes of travel, is the same; but it is the duty of drivers to turn aside, to avoid doing an injury to persons who may be crossing, or standing in their path.—1 Sweeny, N. Y. 288. But this does not mean that each is required to exercise the same degree of care, since the driver is controlling a dangerous animal. (12.) Contributory negligence is matter of defense, and is not required to be negatived by the complaint.—*Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Crenshaw*, 65 Ala. 566; *Railroad Co. v.*

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*Shearer*, 58 Ala. 680; *Tanner v. Railroad Co.*, 60 Ala. 621. (13.) The failure of the defendant to call his driver as a witness, after he had been sworn and put under the rule, justified the second charge asked and refused.—*Fincher v. The State*, 58 Ala. 215; *Adams v. McGar*, 65 Ala. 106; *East v. Pace*, 57 Ala. 521; *Kilgore v. The State*, 74 Ala. 1.

TROY, TOMPKINS & LONDON, *contra*.—(1.) Persons on the highway, whether on foot or in vehicles, have the right of way in common, each equally with the other; and each is bound to use ordinary care for his own safety, and to avoid doing injury to the other.—*Cotton v. Wood*, 8 C. B. (98 Eng. Com. Law Rep.) 566; *Barker v. Savage*, 45 N. Y. 191. (2.) The plaintiff was coming diagonally across the street, in the direction from which the carriage was approaching, and would have seen it approaching, if he had looked up; and being guilty of contributory negligence, he can not recover, although the defendant's driver was in fault.—Cases above cited; *Butterfield v. Forrester*, 11 East, 60; *Tanner v. L. & N. Railroad Co.*, 60 Ala. 12; Beach Contr. Neg., § 4. (3.) Driving a carriage rapidly along the highway, is not culpable negligence as matter of law, but is a question of fact to be determined by the surrounding circumstances, as found by the jury.—*Matson v. Maupin*, 75 Ala. 312. (4.) The failure of a party to produce a witness, of itself, does not justify or authorize any presumption against him.—*McGar v. Adams*, 65 Ala. 110; *Scovill v. Baldwin*, 27 Conn. 316; Lawson's Pres. Evidence, 23, 137.

STONE, C. J.—As a general proposition, the credibility of oral testimony is an inquiry of fact, which must be submitted to the jury. Hence the rule, that in charging juries, it is improper to assume, or state as fact, any material matter which depends on the sufficiency of oral testimony for its establishment. But this rule has a well-defined exception, generated by the great inconvenience that would result from its literal and extreme application in all cases. In the trial of most issues, the real contention is not over every question of law or fact that is involved directly or incidentally. The contestants are usually agreed on many questions,—frequently, very important questions. These become the incident—an indispensable incident—in the cause; but they are not the real subject in contestation. They are material facts, but they are not disputed facts. If the trial judge, in giving his charge to the jury, were required to state all such non-contested facts in the form of hypothesis, his charges would frequently become cumbersome and confusing, if not misleading. The exception to the rule is, that when the record shows affirmatively that cer-

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tain facts are clearly shown and not disputed—not made any part of the contention—then it is not error if they be assumed in the charge to be facts, and stated as such without hypothesis.—*Henderson v. Mabry*, 13 Ala. 713; *Gillespie v. Battle*, 15 Ala. 276; *Kirkland v. Oates*, 25 Ala. 465; *S. & N. Ala. R. R. Co. v. McLendon*, 65 Ala. 266. Care must be observed, however, in applying this principle. It should not be applied, except in cases where it is manifest that the particular fact is conceded, or not controverted. If there is any conflict in the testimony, or if the testimony is of such indeterminate character as that inferences must be drawn to make up its completeness, then such fact, or assumed fact, can not be given in charge without hypothesis.

Charges to juries should have reference to the testimony, and must be construed in connection therewith. And if a charge given, construed in connection with the testimony, is free from error, it will not be ground of reversal, even if it declare a rule which would not be correct when applied to other supposed states of proof. Error, and consequent injury in the case in hand, are the questions for our consideration; and we look not beyond the tendencies of the testimony, in search of possible states of proof, to which the charge would not be applicable. “Charges should always be framed in reference to the testimony, and in construing them we must have regard to the same standard.”—*Alexander v. Alexander*, 71 Ala. 295; 1 Brick. Dig. 345, § 141; *Kirkland v. Oates*, 25 Ala. 465; *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *Hudmon v. White*, 70 Ala. 365; *Farley v. Smith*, 39 Ala. 37.

It was among the undisputed facts in this case, that the injury complained of was done in the day-time, by the carriage horses of defendant, attached to his carriage, and driven by his carriage-driver, in and about his business. The injury was done by the horses, while in motion, striking against plaintiff, and felling him to the earth. It occurred on Lee street, a street in the city of Montgomery, extending north and south, and about one hundred feet wide: between the side-walks about seventy feet wide. On the east side of the street was a livery-stable, and on the west side, but towards the south, and higher up, were a hotel and blacksmith-shop near each other. A person going from the stable to the hotel or blacksmith-shop, would cross the street diagonally, bearing southward. There was no public crossing at that place, but it was used as a private crossing. The injury was done in the public street. The foregoing are undisputed facts, which the court, in charging, could have stated as facts, without hypothesis. To what extent Lee street was a public thoroughfare, is not stated, save as the same may be inferred from the proximity of the livery-stable, the hotel



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and the blacksmith-shop, and, possibly, of the Methodist Episcopal Church.

The proof tended to show that the plaintiff was walking leisurely from a point near the livery-stable, across the street, to the blacksmith-shop, and, when struck, was a little beyond the center of the street. The tendency of the testimony was, that the carriage was being driven "pretty fast" down Lee street, heading north; the carriage having come seventy yards or more in that direction, before reaching the point where the collision occurred. There was testimony, also, tending to show that the street at that time was unobstructed from side-walk to side-walk, and that there was ample space for each to have had unobstructed pass-way. For the plaintiff it is contended, that if the driver had employed proper watchfulness and diligence, he would have seen the plaintiff, and would have deflected from his course, passing around plaintiff, and doing him no injury. For the defendant it is replied, that if the plaintiff had employed proper watchfulness and diligence, he would have seen the approaching carriage, would have gotten out of the way, and have thus escaped all injury. Such defense does not rest alone or necessarily on a denial that the defendant had been guilty of negligence. It rather concedes that he had. The pith of it is, that though the defendant, or his servant, has been guilty of negligence, yet the plaintiff was also guilty of negligence, which contributed proximately to produce the injury; and this, if true, is a bar to his right of recovery, without any reference to the degree or measure of negligence of the one or the other party. It must be proximate—nearest—immediate—a naturally contributing cause of the wrong done; the negligence, or wrong, the cause; the injury, the effect. And this principle applies alike to the plaintiff's complaint, and to the defendant's defense. The plaintiff, to make out his side of the case, must prove the defendant was guilty of negligence, the proximate effect of which was injury to him. This will entitle him to recover, unless it is shown the plaintiff was also guilty of negligence, which contributed proximately to the injury. These were the controverted issues of fact in the trial below.—*Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *M. & C. R. R. Co. v. Copeland*, 61 Ala. 376; *Cook v. Cent. R. R. Co.*, 67 Ala. 533; *M. & E. R. R. Co. v. Thompson*, 77 Ala. 488; *Clements v. E. T., Va. & Ga. R. R. Co.*, 77 Ala. 533; *Beach Cont. Neg.* §§ 63, 64; *Whar. Neg.* §§ 323, 324; 1 *Thomp. Neg.* 407; 2 *Ib.* 1157; *Foster v. Holly*, 38 Ala. 76; *State v. M. & L. R. R. Co.*, 52 N. H. 528; *Wrinn v. Jones*, 111 Mass. 360; *Daniels v. Ulegg*, 28 Mich. 32; *Scovill v. Baldwin*, 27 Conn. 316; *Doggett v. R. & D. R. R. Co.*, 78 N. C. 305; *Robinson v. Western Pacific R. R. Co.*, 48 Cal. 409.

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In Cooley on Torts, 674, speaking of contributory negligence, the author says: "The general result of the authorities seems to be, that if the plaintiff, or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof." See *Butterfield v. Forrester*, 11 East, 60; *Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440; *Woodward Iron Co. v. Jones*, at present term.

There are cases so plain and pronounced in their facts, as that the court may and should give the general charge, if thereto requested, that if the testimony be believed, the defendant is guilty of negligence, or the plaintiff of proximate contributory negligence, as the case may be. The present case, however, can not be placed in that class. The sufficiency of the testimony was a question for the jury, in each aspect of the issue.—*E. T., Va. & Ga. R. R. Co. v. Bayliss*, 74 Ala. 150; *Baker v. Fehr*, 97 Penn. St. 70; *Plummer v. Eastern R. R. Co.*, 73 Me. 591. The case of *Cotton v. Wood*, 8 J. Scott, N. S. possibly goes farther than the authorities in this country would justify.

Charges, we have said, must be interpreted in reference to the tendencies of the testimony; and if, when so interpreted, they declare an incorrect rule for the jury's guidance, this is error.—*Pepper v. Lee*, 53 Ala. 33. Diligence is a relative term, and has not always the same measure. It depends on the nature of the trust, duty, or subject in hand. Hence, if the trust confided, or duty imposed, require delicate handling, or skillful manipulation, to preserve the one, or to so control the other as to do no mischief, the requisite degree of diligence rises in proportion to the delicacy or danger which attends the service. Greater watchfulness and care are required in the proper custody and preservation of a diamond, than need be bestowed on chattels of ordinary value; greater skill and diligence are exacted in the driving of a steam-locomotive than in driving a road-wagon. The reason is obvious; and "law is the perfection of human reason."

In response to an inquiry by the jury, the court charged them, "that, ordinarily, the diligence required by the law of the driver of a carriage in the public street or road, and a foot passenger in a public street or road, was the same; and that the law required, under ordinary circumstances, no greater diligence of the one than of the other." In this the Circuit Court erred.—*Grey v. Mobile Trade Co.*, 55 Ala. 387; *Tanner v. L. & N. R. R. Co.*, 60 Ala. 621; *Shea v. Reems*, 36 La. Ann. 966; *Cottrill v. Starkey*, 8 Car. & P. 691; 4 Wait Ac.

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& Def. 654; Shear. & Redf. on Neg. §§ 24, 305, 314; *Matson v. Maupin*, 75 Ala. 312; *Steamboat New World v. King*, 16 How. U.S. 469; *Cayzor v. Taylor*, 10 Gray, 274; *McGrew v. Stone*, 53 Penn. St. 436; *Carroll v. Staten Island R.R. Co.*, 58 N. Y. 126.

Charges 4, 6 and 7, requested by plaintiff, were rightly refused, because each of them ignores all testimony tending to prove contributory negligence.

Charge 3 was rightly refused, for two reasons: First, the record furnishes no testimony which enables us to affirm that a falsehood was introduced in evidence. True, defendant offered and introduced the admitted testimony of one witness, that he heard plaintiff make a certain declaration, while several other witnesses, having equal opportunity of hearing the declaration if made, testified they did not hear it. This probably cast on the jury the duty of weighing the testimony; but, without more, it could furnish no ground for the application of the rule invoked. "Cases of conflicting statement, or conflicting recollection, frequently occur; and it would be a dangerous precedent, as well as an unsound rule, to visit on the party whose side of the contest was sustained by the minority of the witnesses, the severe intendment which the law denounces against the suborner, or procurer of simulated or manufactured testimony."—*Beck v. State*, at present term. There is, however, another reason why this charge was properly refused. The defendant was not present when the alleged declaration was made; and if the statement of the witness was false, nothing is shown which tends to show defendant had knowledge of its falsity. The charge does not embrace knowledge in its hypothesis. If the statement were entirely false, the defendant was blameless, unless he had knowledge it was false.—*Childs v. The State*, 76 Ala. 93.

The second charge is too general and comprehensive in its terms. Carried to its extent, it would require of a suitor that he should produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction; and failing to do so, to have the presumption indulged against him that such witnesses, if produced, would not support his right. There is a rule, and a just one, that if a party has a witness possessing peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion against him that such better informed testimony would make against him.—*McGar v. Adams*, 65 Ala. 106; *Kilgore v. State*, 74 Ala. 1; *Fincher v. The State*, 68 Ala. 215; 1 Greenl. Ev. § 82. This duty, however, rests with special force on the party who has the burden of proof;



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most generally on the plaintiff. The defendant may, and frequently does, rest his defense on what he considers the weakness of his adversary's testimony, as he interprets it, or on the exculpatory features it presents. He is under no obligation to aid the plaintiff in making out his case.—*McGar v. Adams, supra*. And we must not lose sight of the distinction between charges given and charges refused. If given, it is no ground of reversal, if the proposition be stated too broadly for some categories, provided it correctly asserts the rule as applicable to the testimony before the jury. Nor, if the tendency is to confuse, or mislead the jury, will this alone constitute reversible error. On the other hand, any one of these objections will justify the refusal of a charge which is obnoxious to them. *E. T., Va. & Ga. R. R. Co. v. Bayliss*, 77 Ala. 430; *McKleroy v. The State, Ib.* 95; *Union Ref. Co. v. Barton, Ib.* 148; *Tesney v. The State, Ib.* 33; *Hodges v. Coleman*, 76 Ala. 105; *O'Donnell v. Rodiger, Ib.* 222. The charge asked was too broad and sweeping in its terms, and for that reason, if for no other, the court did not err in its refusal.

The charge which has given us most trouble is numbered one, of those asked by the plaintiff, and refused. Its language is: "It is the duty of the driver of a carriage, when driving through the streets of a city, to keep his eyes open, and to see; and, if in his power, to avoid a collision with any person in the street; and if he did not keep his eyes open, and did not see, when he could have seen, this is negligence in the driver; and if he was driving rapidly through the street, this was culpable negligence. And if the collision with the plaintiff in this case was brought about by such negligence of the driver, without fault, at the time, of plaintiff, then the plaintiff is entitled to recover." We have preserved the punctuation as found in the transcript. Counsel on opposing sides are not agreed as to the interpretation of this charge. The appellee treats the clause, "and if he was driving rapidly through the street, this was culpable negligence," as an independent proposition, not shaded nor controlled by the preceding clause. Counsel for appellant, on the other hand, contend that the hypothesis of the first clause must be understood as pervading the second, and that the manifest meaning of the clause in controversy requires that we supply some word or words of reference, which will connect the two members of the sentence, and make them practically one. Thus interpreted, the contention is, that the clause should be read substantially as follows: "And if he was *thus* driving rapidly through the street," &c. We confess it is difficult to determine which of these renderings, if either, is so clearly right, as we can pronounce it unambiguous. That being the case, we must, in considering whether

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it was rightly refused, interpret it in that sense which is least favorable to the party invoking the instruction. This, we are required to do, under the rule stated above; and under another undisputed rule, that in interpreting doubtful language in bills of exceptions, we must adopt that meaning which is least favorable to the exceptor.—1 Brick. Dig. 251, §§ 120, 122. We are, therefore, forced to treat the clause as an independent proposition, asserting, as matter of law, that driving rapidly through the street is, *per se*, culpable negligence. Thus interpreted, the charge is too broad, and the court did not err in refusing it.

For the single error noted above, the cause is reversed and remanded.

CLOPTON, J., not sitting.

## City Council of Montgomery v. Montgomery Water-Works.

*Action against Municipal Corporation, by Water-Works Company.*

1. *Action against municipal corporation, for water supplied for sanitary purposes; contract ultra vires.*—The defendant in this case, a municipal corporation, having power under its charter to contract with plaintiff for a supply of water to be used in flushing sewers and extinguishing fires, an action lies to recover the agreed price of the water supplied and used in any one year, without regard to the power of the corporate authorities to enter into a valid contract for water for a term of twenty years or more.

2. *Same; set-off or recoupment of damages on account of deficiency in quantity or quality of water.*—In such action against the corporation, the defendant can not be allowed to set off or recoup damages sustained by private persons, citizens and property owners, on account of property destroyed by fires by reason of the insufficiency of the water supplied by plaintiff to extinguish fires; and if the defendant could, in any case, recoup damages on account of the defective quality of the water supplied, the question is not properly raised by the pleadings.

3. *Same; evidence of custom in other cities, as to use of water.*—Evidence of an alleged custom in other cities, having water-works, to use for sanitary purposes, flushing sewers, &c., water drawn through fire-plugs, is not competent or admissible for the defendant, in the absence of evidence as to the terms of the contracts under which the water was supplied and used in those cities.

APPEAL from the Circuit Court of Montgomery.  
Tried before the Hon. JAMES E. COBB.

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These two cases were argued and submitted together, involving substantially the same points; but the actions were commenced on different days, one being brought on the 20th November, 1883, and the other on the 19th May, 1885. The Montgomery Water-Works, a private corporation, the successor of the Montgomery Water-Works Company, was the plaintiff in each case, and sought to recover for water supplied by plaintiff to defendants for sanitary purposes and for extinguishing fires. The Montgomery Water-Works was chartered by an act approved February 15th, 1867, for the term of twenty-five years; and by a subsequent act, approved March 2d, 1871, the time limited for its organization was extended to February 15th, 1873. On the 2d June, 1873, an ordinance was passed by the city council of Montgomery, "granting to the Montgomery Water-Works Company the right to lay down and use iron water-mains, pipes and aqueducts, to and in the city of Montgomery, in conformity with the amended charter of said company, approved March 2d, 1871." The material parts of this ordinance are found in the 3d and 5th sections, as follows: *Sec. 3.* "Be it further ordained, that the said city shall furnish the fire-plugs for said company, and have the same erected, they remaining the property of the city; and shall pay to the said company, for the use of the first one hundred plugs, seventy-five dollars *per annum* for each plug, and for the second hundred fifty dollars for each plug, said plugs to be located at such places as may be selected and designated by the said city council; and the said city council hereby agrees to locate the first one hundred plugs so soon as the pipes are properly laid and distributed, and to locate the others as the wants of the city may from time to time demand, paying only for those located and ready for use, at the prices hereinabove specified." *Sec. 5.* "That the said water-works company shall furnish to the said city for its use, and to the citizens for their use, an abundant supply of good water, at rates not greater than the prices charged in other cities similarly situated; and in the event that the price can not be agreed on, then the company shall select two arbitrators, and the said city council shall select two, and the four thus selected shall choose a fifth; and the arbitrators thus selected, or a majority of them, shall, by an award in writing signed by them, fix the maximum rates and price to be paid to the said company by the said city and its citizens, during the continuance of their charter, for all water furnished them by said company, except for the fire-plugs as hereinabove provided."

In the first action, commenced November 20th, 1883, the plaintiff claimed "ten thousand dollars damages, for this: that said defendant, by an ordinance adopted on June 2d, 1873,"



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authorized the Montgomery Water-Works Company, its successors and assigns, to introduce and lay down its water-mains and pipes in and through said city; "and contracted and agreed that said city should furnish certain fire-plugs for said company, and have the same erected, and should pay to said company, for the use of the first one hundred plugs, seventy-five dollars *per annum* each, and for the second hundred fifty dollars *per annum* each; the said company agreeing and undertaking on its part to furnish, through said fire-plugs, the water needed for protection against, and the extinguishment of fire in said city, and for other purposes incident to the fire department of said city; that said defendant, by said ordinance, further contracted and agreed that said company, for an abundant supply of good water furnished for said city and its citizens, should be paid, in addition to said pay for said fire-plugs, at rates not greater than the prices charged for water in other cities similarly situated, any disagreement as to such prices, except for said fire-plugs, to be determined by arbitration; that said company, under and pursuant to said ordinance and contract, laid mains and pipes in said city, and furnished an abundant supply of good water for the fire-plugs erected and furnished by the city, and for all other wants of said city; that said defendant, in addition to the water used through plugs for the purposes aforesaid, has used large quantities of the water supplied by said company as aforesaid for said city and its citizens, in flushing and washing out the sewers, drains, and streets thereof; that said defendant refused to agree upon the price to be paid for said water so used, or to permit the same to be referred to arbitration, as provided in said ordinance and contract, and thereupon said company, on August 16th, 1878, notified said defendant that water used for flushing and washing out said sewers and drains, and for cleansing them and the streets, would thereafter be charged for at the rate of fifteen cents for one thousand gallons, which said rate was and is not greater than the prices charged for water in other cities similarly situated; and from henceforth hitherto the defendant has continued to use the water so furnished, for the purpose aforesaid, using and consuming therein and therefor large quantities, to-wit, ten millions of gallons in each year, worth, to-wit, \$10,000." The complaint then averred plaintiff's purchase, in 1879, of the franchise and property of said original company, "including its said claim against said defendant for water so furnished prior to that time, which were duly transferred and assigned to plaintiff; and thereafter said plaintiff, under and pursuant to said ordinance and contract, furnished said water so used as aforesaid by said defendant for flushing and cleansing said sewers, drains, and streets. Yet said defendant, though often requested, has failed and refused to agree with plaintiff upon

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the price of said water, and has failed and refused to submit such price to the determination of arbitrators, as stipulated in said ordinance and contract, and has wholly failed and refused, and still refuses to pay for said water so used by it in flushing and cleansing the sewers, drains and streets of said city. Wherefore plaintiff sues."

The defendant filed eight special pleas to this complaint. The first plea denied the plaintiff's corporate capacity, and the second and third were the statutes of limitations of three and six years. The fourth plea alleged that, at the date of said ordinance and contract, the defendant was prohibited by its charter "from contracting any debt, or incurring any liability in the future, for or on account of the city of Montgomery, except such as shall be paid out of the ordinary current revenue collected in the year the debt or liability is contracted;" that said ordinance and contract was therefore *ultra vires* and void, and defendant was only liable each year, from and after the year 1873, to pay to said original water-works company, and afterwards to plaintiff, "the reasonable value of the water used by this defendant during each of said years;" and that it has already paid to plaintiff, and to its predecessor, more than the reasonable value of all the water so used, and therefore owed nothing.

The fifth plea alleged, that the original company, its successors and assigns, by the terms of said ordinance and contract, was bound to furnish, through said fire-plugs, "the water needed for protection against, and the extinguishment of fires in said city, and for other purposes incident to the fire department of said city;" that they failed to supply the water necessary for these purposes, by reason whereof, on divers occasions, during the year 1875 and each succeeding year, destructive fires occurred in said city, which, if water had been supplied as needed, would have been wholly or partially avoided; that the citizens of Montgomery, for whose benefit said contract was made, lost \$20,000 by reason of these fires, which would not have been lost but for said breach of contract; that there has been, by reason thereof, a failure of consideration to defendant, to an amount exceeding \$5,000 annually; and this is set up by way of set-off and recoupment.

The sixth plea alleged, that the plaintiff and its predecessor, in violation of the duty imposed on them by said ordinance and contract, "failed to furnish to this defendant, for its use, or to the citizens for their use, an abundant supply of good water; to defendant's damage, each year, \$5,000; which sums, with interest, are claimed "by way of set-off and recoupment."

The eighth plea cravedoyer of the ordinance and contract, and alleged that, under said ordinance and contract, defendant

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"was entitled to use water from said fire-plugs, for flushing the sewers and drains of the city, upon the consideration of paying for the use of said fire-plugs as mentioned in said ordinance; that the use of fire-plugs, for the purpose aforesaid, is, and was at the date of said ordinance, usual and customary; that this defendant had paid the said water-works company, and plaintiff, for all water not used through said fire-plugs, and also paid all annual dues for said fire-plugs; and that plaintiff's demands are wholly for water used by defendant from and through said fire-plugs, and paid for as aforesaid." Wherefore defendant is not indebted.

The court sustained demurrers to the fourth, fifth and sixth pleas, but overruled a demurrer to the eighth plea. Among the causes of demurrer specially assigned to the eighth plea were these: "Because said plea does not show that it was usual and customary, in the place or neighborhood in which said contract was made, to furnish without extra charge therefor, under such a contract as the one set out in the complaint in this case, water for flushing the sewers and drains of a city; nor does said plea deny that such contract is correctly set out in the complaint." "Because said plea does not show that the alleged custom and usage in said plea set out is such as would be by law attached to the subject-matter of such a contract as the one set out in the complaint in this case, or such as the law would annex to the written terms thereof; and it is not denied that said contract is correctly stated in said complaint." The cause was tried on issue joined on the first, second, third and eighth pleas, and resulted in a verdict and judgment for plaintiff, for \$2,181.86.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the ordinance showing the contract between the parties; evidence as to the quantity of water consumed by the defendant, for sanitary purposes, in flushing sewers, &c.; the price charged to private consumers, and a written notice served by plaintiff on defendant, dated August 5th, 1878, denying defendant's right to use water through the fire-plugs for sanitary purposes, and stating that plaintiff would in future charge fifteen cents per thousand gallons for water so furnished and used. The defendant then offered in evidence the deposition of J. J. Cross, of New York, a civil engineer, "who had been engaged in the construction and operation of water-works for the supply of towns and cities, most of the time since 1857, and had been so engaged in New York, Brooklyn, Newark, Cincinnati, Indianapolis, Princeton, and other cities." The third interrogatory to this witness, and his answer thereto, were in these words: "*Int. 3.* If you say you have such experience or information, then state whether or not it is customary, in



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cities supplied with water-works, to use water from fire-plugs to flush sewers and drains, or to sprinkle streets, or for any and what sanitary purposes; and whether or not such use was common in the year 1873, and before and since that time."

*Answer:* "From my experience and information, I am able to state that, prior to 1873, it was, and still is customary, in cities supplied with water, to use water from fire-plugs for flushing sewers and mains, for sprinkling streets, and for filling cisterns connected with dwellings not otherwise supplied with water." On objection by plaintiff, filed with the cross-interrogatories, the court suppressed this question and answer; to which ruling the defendant excepted. "The defendant offered to prove, also, by the depositions of other witnesses, residing in other cities of the United States, that the use of water from fire-plugs by cities, for flushing sewers and drains for sanitary purposes, was common and general in 1873, in cities supplied with, or having water-works; but the court excluded said evidence from the jury, on the ground that it would vary or contradict the terms of said ordinance, unless it was shown that such use or custom was under contracts similar to that shown by said ordinance. The depositions of said witnesses showed, that the said cities, as to which they so testified, owned the water-works supplying them with water; and some of them showed that the cities, as to which they testified, had special contracts with the water-works companies to pay a given price for water for fire purposes, and a certain other price for water from the fire-plugs for sanitary purposes. To the rulings of the court in excluding this evidence the defendant duly excepted. The defendant introduced, also, evidence tending to show that the average amount of water necessary to furnish cities for fire purposes was one-tenth of one gallon daily for each inhabitant, and three gallons per day for each for fire purposes and sanitary purposes; that the city of Montgomery had a population of about 20,000; that plaintiff's hydrants, about one hundred in number, extended over about two-thirds of the city, and the city had no other means of flushing its sewers and drains than by the use of the fire-plugs for that purpose; and the evidence tended to show that, up to the bringing of this suit, the defendant had paid plaintiff the annual dues specified in the third section of said ordinance for the use of the fire-plugs."

The sustaining of the demurrers to the fourth, fifth and sixth pleas, and the exclusion of the evidence offered by the defendant, as above stated, are now assigned as error.

In the second case, commenced on the 19th May, 1885, the complaint claimed \$10,000, "due for water supplied by plaintiff to defendant, and to the city of Montgomery at the request of

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the defendant; and thereupon plaintiff avers that "said ordinance of June 2d, 1873, was adopted, which was set out in full; "that under, pursuant to, and in accordance with the terms and conditions of said contract," water-works were erected by the company, fire-plugs erected and located, and water supplied through them; that ninety of the one hundred plugs, being thoroughly tested, were found to be sufficiently supplied with water, while the remaining ten were pronounced insufficient; "that thereupon, to-wit, on the 1st January, 1873, the defendant paid to said company, in monthly installments, \$75 *per annum* for each of said plugs sufficiently supplied, and paid nothing for the others, and said payments were accepted and acquiesced in by the company. And plaintiff avers that it was then and thereby agreed, by and between said company and said defendant, that the true interpretation and meaning of said contract was, that said defendant should pay to said company, for each fire-plug accepted by defendant as sufficiently supplied with water, the sum of \$75 *per annum* in monthly installments; and plaintiff avers that, pursuant to this understanding and agreement, defendant continued to pay said sum to said company until, to-wit, June 1st, 1879," when plaintiff succeeded by assignment and purchase to all the rights of said company under said contract; that plaintiff afterwards extended the water-works, and supplied seven additional fire-plugs with water, which were accepted by the defendant as sufficiently supplied; that for each of the fire-plugs so supplied and accepted, ninety-seven in all, defendant paid, and continued to pay until May, 1884, at the rate of \$75 *per annum* in monthly installments; and plaintiff avers that defendant thereby became and was liable, and undertook and promised to pay plaintiff, \$6.25 monthly until the end of said original contract, to-wit, until January 1st, 1895, for each of said fire-plugs so accepted as aforesaid. And plaintiff avers that during said month of May, 1884, and ever since, plaintiff has continued to supply each of said fire-plugs with water in all respects as prior to that time; and the supply of water so furnished has been accepted and used by said defendant, and by the fire department of said city, during and since said month of May, 1884. Yet said defendant has wholly failed and refused to pay," &c. The complaint further alleged that, "under and pursuant to said original contract," plaintiff furnished, "to-wit, from the — day of —, 1883, up to the present time," a large quantity of water for flushing and cleansing sewers, and for laying brick pavements, sewers and cement work, which was worth, to-wit, \$5,000; "and defendant thereby became liable, and undertook and promised to pay plaintiff for the same," but has failed to do so, &c.

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The defendant demurred to the complaint, on the ground that it had no power under its charter to make such a contract as that evidenced by the ordinance, as set out in the complaint. The court overruled the demurrer, and the defendant then filed three pleas. The first plea set up a former recovery as to so much of the plaintiff's demand as related to water furnished during the months of May, June, July and August, 1884; as to that part which related to water supplied during the months of October, November and December, 1884, and January, 1885, the pendency of a former action commenced in the City Court; and as to the rest of the demand acknowledged an indebtedness "for the reasonable value of the water supplied and used, under the direction of this defendant, for flushing and washing out sewers and drains, and for the reasonable value of the water supplied through the fire-plugs for protection against fire, since January, 1885;" but denied its liability under the contract shown by the ordinance, because it had no power under its charter to make such contract. The third plea alleged that the defendant had no power under its charter to make the contract shown by the ordinance; that the original company was not bound by the terms of the ordinance; that if it had become bound, the contract was not capable of assignment, and plaintiff acquired no rights under it, and was not bound by its stipulations; and that the original company was dissolved as a corporation, and unable to respond in damages for any breach. The court sustained a demurrer to each of these pleas, and the cause was tried on issue joined on the plea of *non assumpsit*.

The overruling of the demurrer to the complaint, and the sustaining of the demurrers to the two special pleas, are now assigned as error.

GUNTER & BLAKEY, for the appellant.—(1.) The declaration is a special count on the contract of June 2d, 1873, showing an agreement to pay certain rates for water, and complaining that certain water was used and not paid for. If the contract is void, for the reasons set forth in the fourth plea, then no recovery can be had under the complaint. The question of its validity or invalidity depends upon the construction to be placed on the clause in the city charter which provides that the city council "shall not contract any debt, or incur any liability in the future, for or on account of the city of Montgomery, except such as shall be paid out of the ordinary current revenue of the city collected in the year the debt or liability is contracted."—Sess. Acts 1869–70, p. 338, § 9. The language of the prohibition is plain and unambiguous. It is aimed against every contract by which an obligation to pay may be



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created, for an amount greater than can be defrayed out of the current revenue; or by which the power of each successive council can be curtailed or hampered in the exercise of its discretion in disposing of the current revenue to defray the current expenses. If the revenues of the city can be anticipated and tied up for ten or twenty-five years, they may be for one hundred years. The revenues of the city, each year, are to be determined by the value of the assessed property, which is fluctuating, and are dependent on the rate of taxation, which is subject to legislative control. The contract, if valid, creates the liability to pay in the future, and is within the terms of the prohibition.—*Davenport v. Davenport*, 13 Iowa, 229; *Springfield v. Edwards*, 84 Illinois, 626; *Sackett v. New Albany*, 88 Ind. 473; 45 Amer. Rep. 467; *Law v. People*, 87 Ill. 386; *Prince v. Quincy*, 105 Illinois, 138, 215; *Grant v. Davenport*, 36 Iowa, 396; *French v. Burlington*, 42 Iowa, 614; Dill. Mun. Corp. §§ 130–35. (2.) The fifth and sixth pleas aver a failure of consideration for the promises sued on, and raise the simple question, whether a party can recover, in an action on a contract, the entire price agreed to be paid, when he has failed in performance. In providing water for fire protection, defendant is strictly a trustee, and invested with authority to contract for the people. The losses occasioned to citizens by reason of non-performance, are as much evidence of a partial or total failure of consideration, as if the defendant had contracted for itself, and the losses had been of its own property. (3.) The contract, or ordinance, provided a fixed price for the water furnished through fire-plugs, but did not specify the purposes for which the water so furnished should be used, thus leaving the uses to be determined by custom, or ordinary usage. The terms of the contracts under which the water was so furnished, or the ownership of the water-works, had no bearing on the question as to the customary or ordinary uses to which the water was applied; and the court properly so held, in its ruling on the demurrer to the 8th plea, whilst afterwards excluding the evidence offered in support of it. If the plea was defective, the demurrer to it ought to have been sustained; but, having been held sufficient, evidence supporting it can not be excluded.—*Mudge v. Treat*, 57 Ala. 1.

TROY, TOMPKINS & LONDON, *contra*.—(1.) The prohibitory or restrictive clause contained in the charter of the city of Montgomery was intended, not to prohibit the making of a contract to continue for a longer period than one year, but to provide against the debts incurred under such contracts, whether made for one year or more, exceeding in amount the revenue of any year in which they are to be paid; and this

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clause becomes a part of every contract entered into after its passage. Gas, water, or other protection against fire, and other things necessary and essential to the preservation of health, safety and good order, could not be obtained in many cities and towns, if the municipal authority was limited to contracts for one year only. The plaintiff's construction of the contract is supported by authority.—1 Dill. Mun. Corp. § 131; *East St. Louis v. Gas-Light Co.*, 98 Illinois, 415; *Weston v. Syracuse*, 17 N. Y. 110; *Valparaiso v. Gardner*, 97 Indiana, 1, or 7 Amer. & Eng. Corp. Cases, 626. If the construction were doubtful, the argument *ab inconvenienti* might be invoked. *Kimbrough v. State*, 62 Ala. 348; *Livingston v. Pippin*, 31 Ala. 542; 1 Dill. Mun. Corp. § 97. (2.) But the action is not upon the contract, which is set out merely by way of inducement. The defendant certainly had authority to contract for a supply of water for one year, and for each year in succession; and having received and used the water, it can not refuse to pay for it.—*City Council v. Water-Works Co.*, 77 Ala. 248; *Singer Man. Co. v. Sayre*, 75 Ala. 270; *Bridge Co. v. Frankfort*, 18 B. Monroe, 41; *Gas Co. v. San Francisco*, 9 Cal. 453; *Livingston v. Pippin*, 31 Ala. 542; 1 Dill. Mun. Corp. § 383. (3.) The defendant could not have been made liable for any loss to the property of its citizens, by reason of the insufficiency of the water furnished by the plaintiff; and there is no principle which authorizes a recoupment of the damages by it on account of such losses.—*Black v. Columbia*, 45 Amer. Rep. 785; *Tainter v. Worcester*, 25 Ib. 90; *Robinson v. Evansville*, 44 Ib. 770. (4.) The city was bound to pay a fixed price for the use of the fire-plugs, and another price for all the other water used. If water through the fire-plugs could be used for any and all purposes, then the other stipulation is meaningless and useless. The meaning and uses of fire-plugs are to be determined by reference to the most approved dictionaries, and not by any particular contracts, the terms of which are not shown. The evidence offered was properly excluded, because it did not come up to the requirements of a general custom, and the terms of the particular contracts were not shown.—2 Parsons' Contracts, 542-4, notes; *Insurance Co. v. Wright*, 1 Wallace, 456; *Haywood v. Middleton*, 15 Amer. Dec. 615; *Leach v. Perkins*, 35 Amer. Dec. 268.

SOMERVILLE, J.—These two causes were argued and submitted together, and we find it more convenient to consider them in connection, as both of them, to some extent, are dependent on the same principles.

The suits were instituted by the Montgomery Water-Works against the City Council of Montgomery for water supplied

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the city for the extinguishment of fires, and also for water used for sanitary purposes in flushing and cleansing the public sewers in the city; and a judgment was rendered in the court below for the plaintiff in each case.

It is contended for appellant, that these actions are based strictly upon a certain contract made between the parties litigant in the year 1871, the contents of which are set out in the complaint, and the provisions of which purport to be mutually obligatory for a period of about twenty-four years, or until the year 1895. And the argument is urged, with great force, that this contract, for so great a length of time, is *ultra vires* and void, for two reasons, either of which, it is said, will preclude the plaintiff's right of recovery. The first contention is, that the city authorities were forbidden, by the express terms of their charter, from entering into such a contract for a longer period than one year, such alleged prohibition being found in section 9 of the amended charter of the city, approved March 3, 1870, which was in force at the time the contract in question was made, and which provides, that "the city council shall not contract any debt, or incur any liability in the future, for or on account of the city of Montgomery, except such as shall be paid out of the ordinary current revenue of the city *collected in the year the debt or liability is contracted.*"—Session Acts 1869-70, p. 338, section 9, p. 361. The second objection urged is, that one municipal council, or board of aldermen, can not lawfully tie the hands of its successors for so great a length of time, because it is an attempt by contract to surrender its legislative authority in abridgement of the corporate power belonging to such successors equally with the particular body thus undertaking to barter it away for an agreed price.

These are grave questions worthy of serious consideration. But a careful investigation satisfies us that they do not necessarily arise in the decision of the cases made by the records.

The suits are not, properly speaking, brought upon the contract, or for the purpose of enforcing it as an executory agreement. The contract, it is true, is set forth in the complaint; but this may be considered as done only by way of inducement, in view of the other averments, which show an actual consumption, from month to month, and year to year, by the defendant, of water supplied by the plaintiff for the extinguishment of fires, and of water used, from time to time, for sanitary purposes. The suits, in other words, are upon the contract, only so far as it has been executed by the plaintiff, and no right is based upon it so far as it is executory.

It is not denied that the city council had the power to contract for a supply of water for a single year, to be used for the purposes designated, or that the price agreed to be paid for



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it could not be paid out of the ordinary current revenue of the city for the particular fiscal year during which the liability for it was contracted, as required by the charter. The existence of this power is clear, and can not well be disputed.—*Intendant v. Pippin*, 31 Ala. 542; Acts Ala. 1878-79, p. 374. So, the power to make such a contract for one year being shown to exist, it could be exercised with equal propriety any other year, or successively from year to year, without in any manner infringing upon either of the principles to which we have above adverted as being contended for by the appellant's counsel. There would be no violation of section 9 of the city charter, conceding to it the construction contended for; nor would there be any tying of the hands of any city council by its corporate predecessor. If we admit that the contract is *ultra vires*, so far as concerns the executory part of it, it may nevertheless be good so far as it has been executed on the part of the plaintiff, and the defendant has, without objection, enjoyed its benefits. In legal effect, the result is precisely the same as if the contract had been renewed from month to month, and year to year, the plaintiff furnishing water to the defendant at the latter's mere pleasure.

The defendant having the power to contract from year to year for a supply of water, and having obtained the benefit of such supplies, and appropriated them to its use from time to time, it is both reasonable and just that the services and property thus enjoyed should be paid for, and the plaintiff's right to recover is not interdicted by any sound rule of law, which is known to us.

The case of *City of East St. Louis v. East St. Louis Gas-Light and Coke Co.*, 98 Ill. 415, cited by appellee's counsel, is a well-considered authority which supports the foregoing view in every essential particular. See, also, Field on Corp. § 273; *Hitchcock v. Galveston*, 96 U. S. 341; *City Council of Montgomery v. Montgomery Water-Works Co.*, 77 Ala. 248.

We are aware of no principle which would justify the sustaining of the defendant's pleas of reconpment and set-off. These pleas set up the fact that a large amount of property, owned by private persons, resident within the city limits, had been destroyed by fire by reason of the insufficiency of the water supply agreed to be furnished by the plaintiff, and offer to set off and reconp the damages thereby sustained by these persons. It seems to be settled, according to the better view, that the power conferred upon municipalities to organize fire companies, and supply other means for the protection of property against destruction by fire, is a power in its nature legislative and governmental, involving the exercise of judgment and discretion in its proper execution. In this particular it differs

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from the ordinary case of a corporation charged by statute with the performance of a mere ministerial duty. For the erroneous exercise of such governmental power municipal corporations are not liable, nor are they responsible to individuals for the neglect or non-feasance of their agents in the discharge of their official duties touching such matters. — *Wheeler v. City of Cincinnati*, 19 Ohio St. 19; s. c., 2 Amer. Rep. 368; *Black v. City of Columbia*, 19 S. C. 412; s. c., 45 Amer. Rep. 785. In view of this non-liability, there is, even in an equitable point of view, an utter absence of relevancy in the fact that damages have accrued to a third person, between whom and the defendant there is no privity of legal relationship or liability. The plaintiff, moreover, does not owe the defendant for such damages. If it owes any one, it is the individuals whose property has been destroyed. This want of mutuality is fatal to the allowance of the claim.

The evidence sought to be introduced by the defendant, as to an existing custom in other cities of the United States, having water-works, to use water drawn through fire-plugs for sanitary purposes, flushing sewers, and the like, was properly excluded from the jury. The terms of the contracts, under which this so-called custom was alleged to exist, were not proposed to be shown, nor was there any evidence offered as to whether any compensation was paid for this extra use of water.

This evidence falls short of any effort to prove that, when the city purchased the use of "fire-plugs," there was included in this right, thus bargained for, the privilege of using, free of additional charge, water for sanitary purposes. The record does not, according to our view of the matter, raise the question as to whether or not the compound word "fire-plug" may not have a flexible signification, which would be broad enough, under peculiar circumstances, to permit the meaning contended for by appellant's counsel to be attached to it by established usage.

Nor is the question raised by the pleadings, in proper shape, whether the defendant was entitled to recoup for the alleged defective quality of the water furnished.

We discover no error in the rulings of the court, in either case, on the pleadings or the evidence; and the judgments must each be affirmed.

CLOPTON, J., not sitting.

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### *Bill in Equity by Creditors to set aside Conveyances as Fraudulent.*

1. *Revision of chancellor's decision on question of fact.*—To justify a reversal of the chancellor's decision on a question of fact, the evidence must clearly show that his conclusion is erroneous.

2. *Proof of fraud.*—Under a bill by creditors attacking conveyances of his property by their debtor on the ground of fraud, fraudulent practices by the debtor in prior transactions with other persons, and declarations made by him subsequent to the execution of the conveyances, are not competent evidence against the grantees.

3. *Conveyance in name of third person; burden of proof as to ownership of money paid.*—Property purchased by a debtor, and paid for with his money, is liable to the satisfaction of his debts, though the title be taken in the name of another person; but the burden of proving these facts is on the attacking creditor, and, if he fails to prove that the money paid belonged to his debtor, the source from which it was derived, or its real ownership, is immaterial.

4. *Transactions between relatives.*—A transaction between relatives will be more closely scrutinized by the courts, at the instance of creditors, than a transaction between strangers; yet relationship is not, of itself, sufficient to stamp a transaction as fraudulent; and a *bona fide* creditor, closely allied to his insolvent debtor, may take property at a fair price in payment of his debt, as any other creditor might.

5. *Burden of proof as to consideration, and as to fraudulent intent.* When the attacking creditor has proved the existence of his debt at the time of the sale and conveyance, the *onus* is cast on the grantee or purchaser to show the payment of a valuable and adequate consideration; and such payment being shown, the question of intent becomes material; as to which the *onus* is shifted to the complainant, and he must show a fraudulent intent on the part of his debtor, and the grantee's knowledge thereof or participation.

6. *Purchase of property of insolvent debtor, by his brother.*—The insolvent debtor being indebted to his brother for borrowed money, and being unable to pay it on demand, in order that it might be invested in real estate, may lawfully convey property, at its fair value, in payment of the debt; and if the value of the property is greater than the amount of the debt, and the difference is paid to the debtor in money, and is used by him in the payment of other debts, the transaction will be sustained against creditors, when it is not shown that the grantee had knowledge of the debtor's pecuniary condition; though, in the absence of evidence as to such application of the money, or if notice had been brought home to the grantee of the debtor's intention thus to prefer creditors, the court would be inclined to hold the sale fraudulent as against the creditors not paid.

7. *Conveyance sustained, when equity would have compelled it.*—Where the debtor, being indebted to his brother for services as his clerk, bought a tract of land for him, at his instance, but took the title in his own name, afterwards promising to execute a proper conveyance, but failing to do so for several years, during which time the brother occupied, cultivated and improved the land; held, that a conveyance



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executed after the lapse of four years, when the debtor had become insolvent, would be regarded as the voluntary performance of an act which a court of equity would have compelled, and the transaction would be sustained.

8. *Conveyance of stock of goods by insolvent debtor to his brother, in consideration of services rendered as clerk.*—In this case, an insolvent debtor having conveyed to his brother a stock of goods valued at \$6,000, but not worth so much, in payment of a recited debt of \$8,000; the transaction was sustained against the attack of creditors, affirming the chancellor's decree, on proof that the grantee had acted as clerk and salesman in the store of the grantor, for fifteen years; that it was agreed his compensation should be reasonable, but no amount was stipulated; that no account was kept with him on the books; that he was an unmarried man, was economical, and boarded in the family of the grantor; that he had been promised an interest in the business as a partner; that no former settlements were ever made, though often demanded by him, and often promised; and that no memorandum was kept of the settlement at which \$8,000 was agreed on as the amount of the indebtedness.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 12th July, 1884, by Bernard Moog individually, and as the surviving partner of the late firm of A. & B. Moog, claiming to be a creditor of Owen Farley, against the said Owen Farley and his two brothers, Bryant and John E. Farley; and sought to set aside, on the ground of fraud, several conveyances of property to said Bryant and John E. Farley, and to subject the property to the satisfaction of the complainant's debt against said Owen Farley. The conveyances, copies of which were made exhibits to the bill, were four in number: 1st, a conveyance of said Owen Farley's entire stock of groceries to John E. Farley, which was dated January 10th, 1884, and recited a consideration of \$6,000 paid, part of a larger indebtedness; 2d, a conveyance of certain real estate by said Owen to Bryant Farley, which was also dated the 10th January, 1884, and recited the payment of \$2,700 as its consideration; 3d, a conveyance of certain real estate by said Owen to John E. Farley, which was dated the 6th November, 1883, but was not filed for record until the 11th January, 1884, and which recited the payment of \$100 as its consideration; and, 4th, a conveyance of certain real estate by John F. Williams to said John E. Farley, which was dated March 8th, 1884, and recited the payment of \$3,750 as its consideration. As to the conveyance last mentioned, the bill sought to subject the property to the satisfaction of the complainant's debt, on the ground that the purchase was made for the benefit of said Owen Farley, and the purchase-money paid by him; and as to the others, on the ground that the property was conveyed by said Owen in fraud of his creditors, he being then insolvent, that the recited considerations were

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fictitious and simulated, and that the grantees knowingly participated in the fraud of said Owen. The complainant's debt was evidenced by several promissory notes which said Owen Farley had executed to A. & B. Moog, or on which they had become accommodation indorsers for him, dated and maturing on different days between October, 1883, and January, 1884, aggregating about \$3,000; and it was alleged that he owed other debts, and that the said conveyances, with others not attacked in this suit, conveyed all of his property. Answers were filed by each of the defendants, denying the charges of fraud, and asserting the validity of the several conveyances; stating also, in answer to interrogatories, the particular consideration of each, and Bryant and John E. Farley each denying their knowledge of the insolvency of said Owen. On final hearing, on pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

G. L. SMITH, for appellant.—The conveyances sought to be set aside were made by an insolvent debtor to his two brothers, and conveyed substantially all of his property; and one of these brothers had, for fifteen years, had the entire management and control of the grantor's store, if indeed he was not a partner. The existence of the complainant's debt at the time these conveyances were executed being shown, the *onus* was on the grantees to prove the *bona fides* of the recited considerations, and to explain all the badges of fraud.—*Pickett v. Pipkin*, 64 Ala. 524; *Harrell v. Whitman*, 61 Ala. 278; *Hubbard v. Allen*, 59 Ala. 296. The evidence clearly establishes a deliberate scheme on the part of Owen Farley, he being insolvent, to hinder, delay and defraud his creditors, by disposing of his property, and putting it beyond their reach; and the material question is, whether his two brothers did not know his condition, and knowingly aid in the consummation of his plans.

(1.) *As to the conveyance of the stock of goods*, the attempted explanation of the parties is wholly improbable, and insufficient. The conduct of the parties, during their long business connection, is more reconcilable with the existence of a partnership between the two brothers, than with the theory of an agency, or clerkship. The name of John E. Farley nowhere appears on the books; no account was kept with or against him; no itemized account was ever made out between them, and they admit that, at the time of the alleged settlement, they did not know exactly how the account stood between them. This is not sufficient to sustain the settlement, as the consideration of the sale.—*Hamilton v. Blackwell*, 60 Ala. 547; *Hubbard v. Allen*, 59 Ala. 300; *Donagan v. Davis*, 66 Ala. 365; 8 Dana,

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103; 13 Wisc. 283; 84 Penn. St. 253; Freem. Ch. 435. In the purchase of some of these goods by Owen Farley, when he was insolvent, he perpetrated a fraud on the vendors; and John E. Farley, having knowledge of these facts, actively participated in the fraud; and therefore, his purchase being fraudulent as to a part of the property, the entire transaction is fraudulent and void.—*Tatum v. Hunter & Thomas*, 14 Ala. 557; *Wiley, Banks & Co. v. Knight*, 27 Ala. 349; *Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 213.

(2.) *As to the lands purchased from Mrs. Thompson:* The consideration recited in the deed from Owen to John E. is \$100, while the evidence shows that the property was worth \$475; and the deed was not put upon record for several months, and not until Owen had disposed of the rest of his property. On these facts, the sale was for a grossly inadequate price, and therefore void as to creditors. In avoidance of this, it is said by John E. that his brother bought the property for him, and charged him in his account with \$475 as the price paid; that he did not read the deed, did not know the consideration recited, and failed to record it from mere oversight. But there is no contemporaneous evidence as to the charge in the account, and the parties testify that no account was kept between them; and a party will not be heard to say that he did not read a deed.—*Goetter, Weil & Co. v. Pickett*, 61 Ala. 387. As to the purchase of adjoining lands by John E., the question arises, Where did he get the money to pay for it? It could not have been paid for out of the \$15 per month, his only source of revenue from the store, for which he claims to have accounted on settlement with Owen; it could not have been borrowed from his mother, who had no money to lend; and it would be strange for him to be borrowing money from his mother, when his brother, solvent as he believed, owed him \$8,000. If the purchase-money was paid by John E. with his own funds, it must have been with moneys which he drew from the business, or on account of his wages as clerk; and this contradicts his story as to the consideration paid for the stock of goods.

(3.) The same suggestions apply to the purchase of the property on Government street.

(4.) *As to the sale to Bryant Farley:* It is certain that \$135 was paid by Bryant to Owen Farley after the 11th January, when Bryant knew that Owen had sold out all his property; and for this sum, at least, Bryant is liable to the complainants. It is certain, too, that on the 8th January, when Bryant paid Owen \$1,300, he was charged with knowledge of facts which, if followed up, would have led to the discovery of Owen's insolvent condition and fraudulent intent. Nor is it



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shown that this money was used by Owen in the payment of honest debts.

OVERALL & BESTOR, *contra*, submitted a printed argument, in which they analyzed the evidence as to each of the transactions assailed by the bill, insisting that each was supported by a sufficient consideration; and cited the following authorities: Bump on Fraud. Conveyances, 221-23; *Dewey v. Littlejohn*, 2 Ired. Eq. 495; *Chamberlain v. Dorrance*, 69 Ala. 40; *Hubbard v. Allen*, 59 Ala. 301; *Bradley & Co. v. Ragsdale*, 64 Ala. 558; *Eskridge v. Abrams*, 61 Ala. 134; *Clements v. Moore*, 6 Wallace, 312; *Levy v. Williams*, at last term, *ante*, 171; *Warren & Burch v. Jones*, 68 Ala. 449.

CLOPTON, J.—The record only presents for revision the decisions of the chancellor on questions of fact; and in considering them, we shall observe the settled practice, that to authorize a reversal in such case the evidence must clearly show that his conclusions are erroneous. In the investigation, the assignments of error founded on the rulings or objections to testimony, not insisted on in the argument, will be treated as waived. We shall also dismiss from consideration, other than as they may be regarded as affecting the credibility of Owen Farley as a witness, his alleged fraudulent practices, by misrepresentations or otherwise, to induce strangers to this suit to become indorsers on his paper, or to obtain other favors, which do not consist of fraudulent dispositions of his property, are prior to the transactions in controversy, and of which it is not shown the other defendants had any knowledge, or participated therein; and his declarations, made after the execution of the conveyances attacked, will not be regarded for the purpose of impeaching them.

One of the purposes of the bill is, to subject to complainant's demands the lots on the south side of Government street in Mobile. These lots were purchased from John F. Williams, in March, about two months after the open failure of Owen Farley, and the deed was executed to John E. Farley. There is no pretense that the property was, at a time anterior to the purchase, owned by Owen Farley. Its condemnation is sought, on the claim that the purchase-money was furnished by him, and that it was bought for his benefit. If such be the fact, it is liable to complainant's debt; but, under the circumstances, the burden of establishing this fact is on complainant. The uncontradicted evidence of several witnesses shows, that the negotiations for the purchase were carried on by John E. Farley, who stated, at the time, that he was using the money of his mother, and was purchasing the property for her; but

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that, by her consent, the conveyance was to be made to him, to aid him in carrying on his business, to which he also testifies as facts. Because of some defect in the certificate of acknowledgment, the deed was sent back to St. Louis to be perfected. In the meantime, a part of the money was left with his attorney, and the balance was deposited in a banking-house in Mobile. On the return and delivery of the deed, the property was paid for with the check of the attorney for the amount left with him, and the check of John E. Farley for the amount deposited in bank. Much of the money consisted of fractional currency, was musty, and had the appearance of having been withdrawn from circulation and kept for some time. It is unreasonable to suppose that Owen Farley, who had been engaged in mercantile business for fifteen years preceding, in carrying on which he constantly needed money, and when he was keeping deposit accounts with one or more banks, would have withdrawn that amount from his business, and hoarded and kept it in some private place unemployed. The argument is the insufficiency of the proof to show that the mother had money, or the means of acquiring it; and it is insisted that therefore we should presume it was the money of either Owen Farley or of John E. Farley. In the absence of evidence showing it was Owen's money, and against the opposing testimony of witnesses, we are not authorized to presume the fact. To justify a presumption of fraud, circumstances must be proved on which to found the inference. Unless the purchase was made with his money, his creditors are not injured, and have no right to complain. It matters not to them from what other source, or in what other manner, the mother acquired the money. Her removal into the house as a residence, and the occupancy of the lower story by John E. Farley as a store, tend to corroborate his statements, and indicate the purposes for which the property was purchased. And, when the complainant offers no evidence to show that the money used was the debtor's, the burden of proof being cast on him, it will be presumed, for the purposes of this case, that the money was not his.—*Lehman Bros. v. McQueen*. 65 Ala. 570.

The bill further assails as fraudulent a conveyance of other lots in Mobile to Bryant Farley, and conveyances of land and a stock of goods to John E. Farley. A circumstance applicable to all the transactions is relationship, the parties being brothers. While the earlier cases class relationship among the badges of fraud; the later and better opinion is, that it is a circumstance to be considered and weighed in connection with the other circumstances of the transaction. What are denominated badges of fraud, do not conclusively establish it. They

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are evidence of a fraudulent intent, which may be rebutted and explained, but from which, if unexplained, fraud may be, and sometimes should be inferred. The explanatory proof must be clear and satisfactory—more convincing than the evidence of the badge of fraud, as drawn from general observation and experience. A transaction between relatives will be more zealously scrutinized, than if between strangers; yet relationship is not sufficient, of itself, to mark a transaction as fraudulent; and “a *bona fide* creditor, though he be closely allied to his debtor, and the latter insolvent, may take property, at a fair price, in payment of his debt, and his title will be unassailable.”—*Hubbard v. Allen*, 59 Ala. 283; *Bradley v. Ragsdale*, 64 Ala. 558. When the creditor proves the existence of his debt at the time of the sale, the *onus* is then cast on the purchaser to show the payment of an adequate and valuable consideration. Upon payment of such consideration being shown, an inquiry as to the intent becomes material, in respect to which the burden is shifted on the complaining creditor, the payment of a valuable and adequate consideration repelling the presumption of fraud, that would otherwise arise.

In respect to the transaction with Bryant Farley, the evidence shows that, in June, 1883, he loaned Owen twelve hundred dollars, for which the latter gave a due-bill. About January 8, 1884, he called on Owen for payment of the due-bill, stating to him that he desired to purchase real estate, such investment being more profitable than loaning his money or keeping it in a savings-bank. It is shown by his bank-book that he then had over seventeen hundred dollars on deposit in the savings-bank. Owen was unable to pay him, and proposed to sell him city property. After some negotiation as to the price, he purchased the lots in controversy, at twenty-seven hundred dollars, and paid him on the same day the due-bill and about thirteen hundred dollars in cash, as Owen said he needed some money; and the balance of the purchase-money two or three days afterwards, when the deed was delivered. The cashier of the bank testifies, that Bryant had the amount mentioned on deposit, and to his having drawn it out on that day. His ability to purchase is made apparent, and the payment of a valuable and adequate consideration is sufficiently proved. It thus was incumbent on the complainant to show, not only the fraudulent intent of Owen, but also Bryant's knowledge of such intent, or his participation therein. It is not shown that he had any actual knowledge of his brother's financial embarrassment, or of any indebtedness, other than the amount due him. It may be conceded, that their relationship, the customary way of carrying on such mercantile business, and the information which he received from his brother of his inability



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to pay, and his need of money, were sufficient to put him on inquiry. If there was an absence of evidence as to the application of the money paid, or if notice had been brought home to Bryant of the intention of his brother to prefer creditors in the future, we would be inclined to hold the sale fraudulent as against unpreferred creditors, on the authority of *Lehman, Durr & Co. v. Kelly*, 68 Ala. 192. But it is shown that the money was applied to the payment of debts, and there is no evidence that Bryant had any notice, or reason to suspect any necessity to prefer creditors, or his brother's inability to pay his indebtedness in full. He was regarded in the business community as solvent, up to the day of his failure.

It is insisted that the application of the money is only proved by Owen Farley. In answer to an interrogatory, he gives the names of the creditors whose debts were paid, one of them being a note on which complainant's firm was an indorser; and thus furnishes the names of witnesses, by whom the alleged payments could be disproved, if his testimony was false.—*Eskridge v. Abrahams*, 61 Ala. 134. Such testimony, uncontradicted after means and opportunity afforded, produces a reasonable conviction that the money was applied to the extinguishment of debts justly due; and such application is inconsistent with participation by Bryant in an intent to defraud creditors. Where the proceeds of sale have not been diverted from the payment of debts, but have been honestly applied to the liabilities of the debtor, the transaction will not be pronounced fraudulent. When the property is thus appropriated, other creditors can not complain.—*Clements v. Moore*, 6 Wall. 299.

The land on the Bay shell-road was purchased by Owen from Mrs. Thompson, in 1879. Owen and John both testify, that the purchase was made at the instance, and for the benefit of John, and that the amount of the purchase-money was paid by a credit on Owen's indebtedness to John for his services as clerk. The deed was taken in his own name; on discovering which, John called on him for a deed; which Owen promised to execute, but postponed it from time to time, until November, 1883, when the deed in question was made, and acknowledged before a qualified officer on the day of its execution. It appears from their own, and the testimony of other witnesses, that John went into possession in 1879, soon after the purchase, improved the place, planted orange and pecan trees, which he purchased the same year, has occupied and cultivated it ever since, sold several hundred dollars worth of wood therefrom, and has enlarged it by purchases of adjoining lands. If it had been a sale of the land in November, 1883, the consideration recited would have been a material circumstance to be

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considered; but, as it was not a sale—only the consummation of what ought to have been done several years previously—its materiality is destroyed, and it is not sufficient to stamp the conveyance as fraudulent. On the evidence, we are forced to the conclusion, that John was the beneficial owner of the land before the debt of the complainant was contracted, and that Owen, in conveying it to him, only did what a court of equity, under the circumstances, would have compelled him to do.

The character of the sale and transfer of the stock of goods to John E. Farley must be determined on other principles, to some extent. We have found great difficulty in attaining a satisfactory conclusion as to this transaction. As growing out of the right of a debtor to prefer his creditors, we have held, in several late cases, that an absolute sale of his property by a debtor, though insolvent, to a creditor, in payment of an antecedent debt honestly due, the amount of the indebtedness being commensurate with the value of the property, and no benefit reserved to the debtor, will be maintained, though the debtor may have been moved by a fraudulent intent, and provided the creditor does no more than is necessary to procure the payment of his debt. In such case, the creditor's knowledge of the debtor's insolvency is immaterial. The inquiries are addressed to the honesty of the indebtedness, its amount as commensurate with the value of the property, and the reservation of a benefit to the debtor.—*Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, *Id.* 120; *Levy v. Williams*, *ante*, 176.

The claim is, that Owen Farley, being largely indebted to John for his services as clerk, sold him the goods in satisfaction of the indebtedness. The rendition of the services, and their value, are proved by several disinterested witnesses, who are engaged in business in Mobile. The same witnesses also prove, that he was competent, diligent, and attentive to business, and is an unmarried man, of steady and economical habits. The amount of his compensation was not fixed, but he was to be paid the reasonable value of his services. He boarded in the family, and, when he needed money for other expenses, applied to Owen, who supplied it. No settlement was ever had between them until January 10, 1884. No account with John was kept on the books; no memorandum of the settlement was preserved; and there is no evidence of the amount of compensation allowed, nor of the deductions made on account of money received or advanced for him. On the settlement, it was ascertained and agreed that Owen was indebted to him in the sum of \$8,000. In payment and discharge of this indebtedness, Owen sold him the stock of goods, which were valued at \$6,000; but, as subsequently ascertained, were not worth so much. Of this, however, the other creditors can not complain.

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The indebtedness being established, it is not a matter of grievance to them, that property of value less than its amount is taken in full satisfaction, and a release of the entire debt is given.—*Chamberlain v. Dorrance*, 69 Ala. 40.

The explanation given of the unusual circumstance of rendering services for fifteen years without an understanding as to definite compensation, and without any settlement, is, that Owen had promised him an interest in the business, and that repeated requests for a settlement were made, which was as repeatedly promised and postponed by Owen, but always admitting he was largely indebted to John. In October, 1883, John quit the employment of Owen, because of his failure to obtain a settlement, remained away about four weeks, and then returned, on assurances that a settlement should be made. It is said that this is only proved by the brothers. John, in his evidence, names two individuals, who, as he states, were present, and knew of the agreement on which he returned. It is true, the testimony of these persons to the same fact would have corroborated his; but, so far as appears, they were accessible to examination by the complainant, if they would disprove his evidence. Witnesses, swearing falsely, do not usually name other persons, who are accessible, and can be used to disprove their statements.

We do not concur with counsel, that the only reasonable explanation of the circumstances is, that John was a partner. All the evidence tends to show, that he acted in the capacity of a clerk, being the principal salesman. It does not seem unreasonable, that, in anticipation of an interest, he was willing to permit the amount due him to remain in the business; and it may be that he submitted to the repeated postponements of a settlement, under the influence of this promise, and from his confidence in his brother. Neither is it unreasonable, that an unmarried man, of a saving disposition and economical, should accumulate eight thousand dollars in the course of fifteen years, whose services are as valuable as his are proved to have been. If the usual and average expenses in Mobile, of such a person as the witnesses represent him, exceeded fifteen dollars per month, exclusive of board, the fact was susceptible of proof. It is not shown that, during the time, he made any investments, except the purchases of lands on the shell-road, which aggregated about one thousand dollars; and five hundred dollars of this, he states, were borrowed from his mother, in October, 1882; but he gives no explanation why he was borrowing money, when his brother was so largely indebted to him.

In *Pyron v. Lemon*, 67 Ala. 458, we held, that a sale of lands, by an insolvent father to his sons, about the time they



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attained their majority, will not be upheld, on their evidence that the land was paid for in services rendered by them, without stating the kind of labor, or its value by the month or year. In *Hubbard v. Allen*, 59 Ala. 283, it was held, that where the alleged consideration of a conveyance, by an insolvent father to his daughter, was money given her as birth-day presents, which the father used, no memoranda or account of which was kept, an estimate of the aggregate amount, on the father becoming insolvent, for which he gave his note, the amount having been estimated from memory, without any *data*, and without recollection of the years in which the presents were made, or of the sum given at any one time, is too vague and uncertain, and is not the clear and full evidence which the law requires, to sustain the conveyance against a creditor whose debt is established. In each of these cases, the conclusion of the chancellor was against the validity of the conveyance. In the present case, the kind of services, their value, and the period of time during which they were rendered, are sufficiently proved. The uncertainty does not consist in the mode of ascertaining the primary amount of indebtedness, or in the *data* from which to estimate it, but in the estimate of the sum of abatement by credits or payments, no account having been kept. The evidence, in respect to its sufficiency, does not fall within the rule, as held in either of the cases cited. When the creditor has satisfactorily established the existence of an indebtedness, and its original amount, he will not be held to show, with the same degree of certainty, the items or amount of credits to which the debtor is entitled. Where a settlement has been had, and credits allowed, in the absence of evidence tending to show that the debtor should have received credits other than those admitted, the creditor will not be required to prove the non-existence of other payments.

Under all the circumstances, some of which are calculated to excite suspicion, and to call for strict scrutiny, it must be conceded, that the evidence of the amount of indebtedness claimed is not as satisfactory and convincing as is desirable, or as it might have been made. The precise sum remains, to some extent, in uncertainty. A reversal, however, involves an affirmation that the circumstances, without other contradictory proof, are clearly sufficient to overcome the positive statements of witnesses, some of whom there is no attempt to impeach. If the proof of the primary indebtedness were of the same character as that relating to its reduction by way of credits or payments, we would not hesitate to declare that the debt had not been sufficiently established. But, whatever might be our conclusion if we were deciding the question originally, we are unable to say, after careful examination and.

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consideration, that the conclusions of the chancellor are clearly erroneous.

Affirmed.

## Smith v. The State.

### *Prosecution for Carrying Concealed Weapons.*

1. *Former acquittal, or conviction; continuous offense.*—Carrying a weapon concealed about the person (Code, § 4109), is necessarily an act continuous in its nature; and where it appears that the defendant, while visiting a neighboring plantation, and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he can not be again prosecuted on the testimony of the persons who saw him at the other house.

FROM the County of Court of Macon.

Tried before the Hon. P. S. HOLT.

The prosecution in this case was commenced by an affidavit, made by Amanda Brown, on the 16th February, 1885, which charged, "that John Smith carried a pistol concealed about his person, and that said offense was committed in said county of Macon." On the trial, as the record and bill of exceptions show, the defendant having pleaded a former acquittal, on which plea issue was joined, he introduced in evidence the record of a former acquittal, and the affidavit on which it was founded. That affidavit was made by Eli Butler, on the 27th December, 1884, and charged the offense in the same words as the affidavit in this case; and the judgment of acquittal, on verdict of not guilty, was rendered on the 16th February, 1885, and was in all respects formal. "The defendant then proved by Eli Butler and Dave Spencer, that they were subpoenaed as witnesses in said case against the defendant at the last term, and were examined as witnesses on the trial, and testified as follows: that the defendant, on Friday of last Christmas week, came to the plantation of E. T. Varner, where all the witnesses lived, and went from house to house inviting the people who lived there to a party to be given by him; that they met the defendant at the house of one Bill Foote, on said place, and saw him take from his pocket a pistol which was before concealed from observation; and said witnesses were now present at this term of the court, having been subpoenaed for the State as witnesses, on the charge preferred by Amanda Brown. The defendant then introduced said Amanda Brown and one John

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Moore, who testified, that they also were subpœnaed as witnesses for the State in said prosecution against the defendant at the last term, but were not examined on the trial; that they had been again subpœnaed, and were now present as witnesses for the State on the pending charge; that the defendant came to the Varner place, on said Friday of last Christmas week, to invite the people to a party; that he came to the house of said Amanda, and remained there about half an hour; that they there saw him take from his pocket a pistol, which was before concealed, and put it back in his pocket; and that he then went immediately to the house of Bill Foote, which was about sixty yards distant from said Amanda's house, where said Butler and Spencer had testified they met him. It was proved, on the part of the State, that the present prosecution was founded on the testimony of said Amanda Brown and John Moore; and that on the trial at the last term, the evidence was, on the defendant's motion, confined to Bill Foote's house, where said witnesses testified to defendant's having the pistol." On this evidence, the court charged the jury as follows: "There is nothing necessarily continuous in the offense of carrying concealed weapons, and a man may be tried and convicted of carrying a concealed weapon twenty times a day, if he exhibits it at so many different places." The defendant excepted to this charge, and requested the following charge in writing: "If the evidence shows that the defendant exhibited the pistol at the house of Amanda Brown, and went from there, in a very short time, to the house of Bill Foote, only sixty yards distant, and there again exhibited the same pistol, the weapon each time being taken from a place of concealment on his person; and that all this occurred on the same day; and that the defendant was tried and acquitted on the charge of carrying a pistol concealed on his person at the house of Bill Foote,—then they must find for the defendant." The court refused to give this charge, and the defendant excepted. Under these rulings of the court, the jury found the issue against the defendant; and issue being then joined on the plea of not guilty, he was convicted on the testimony of Amanda Brown and John Moore, substantially as above set forth.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—Defendant was prosecuted for carrying a pistol concealed about his person, under section 4109, as amended by act approved February 19, 1881.—Sess. Acts, 38. To carry, in this statute, means "to convey, bear, or transport, by sustaining the thing carried, or causing it to be sustained." Worcester's Dictionary. We think that, *ex vi termini*, it is



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continuous in its nature, and that the two alleged acts shown in the proof, amount to no more than one continuous act of carrying.—*Owens v. The State*, 74 Ala. 401. Any other interpretation would furnish no rule for determining into how many indictable offenses one act of continuous carrying could be subdivided.

Reversed and remanded.

## Levy v. The State.

### *Indictment for Larceny of Bank-Note.*

1. *Description of bank-note in indictment.*—In an indictment for larceny, it is sufficient to describe the thing stolen as “one five-dollar bill, commonly known and called *greenback*, currency of the United States, of the value of five dollars.”

2. *What constitutes larceny.*—If one receives a bank-note, or other money, to be changed, and places it in his pocket, with the fraudulent intent at the time of converting it to his own use, and refuses to deliver it or the change on demand, he may be convicted of the larceny of the money so received.

FROM the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

The defendant in this case was indicted for the larceny of “one five-dollar bill, commonly known and called *greenback*, currency of the United States, of the value of five dollars, the personal property of James M. Ford.” He demurred to the indictment, “because it fails to allege the number or denomination of the bill, or that it was to the grand jury unknown;” and his demurrer being overruled, he pleaded not guilty. On the trial, as appears from the bill of exceptions, the prosecutor testified, in substance, that he came into Opelika, on the 20th December, 1884, with a load of fodder for sale, and sold it to one Preston, for \$7.20; that Preston paid him a five dollar bill, and the residue in silver; that he then went into defendant’s store, and bought two under-shirts, for which he paid \$1.50 in silver; that he then asked for a pair of jeans pants, and the defendant showed him a pair, saying that the price was \$2.00; that he agreed to take them at that price, and handed defendant the five-dollar bill, “out of which he was to take the price of the pants, and hand him the remainder;” that the defendant wrapped up the pants and handed them to him, and put the five-dollar bill in his pocket-book; that he then asked for the change, and the defendant replied,

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"There is no change coming to you; you gave me a two-dollar bill," at the same time showing a bill, which he took from his pocket, and which he said was the same one he had received. The prosecutor took the two-dollar bill and the under-shirts, and left the store; but he soon returned, in company with a friend, to whom he had related the facts, and "offered to say no more about it, if defendant would give him the pants, in addition to the two dollars he had received, and, if not, that he would have him arrested;" but the defendant still insisted that he had only received a two-dollar bill, and that he owed nothing. The prosecutor testified, also, that he had no money at that time, except what Preston had paid him; and Preston and one Culpepper, who was present at the time the money was paid, each testified that the bill was a five-dollar note; but no one of the three could describe it, "nor say whether it was a treasury-note, national-bank bill, or silver certificate." The defendant, testifying as a witness for himself, stated that the note which he received was a two-dollar bill.

On this evidence, the court gave the following charges to the jury: (1) "If the jury believe from all the evidence, beyond a reasonable doubt, that the defendant, at the time he received the bill from Ford (if such be the fact), intended to convert it to his own use, and put it in his pocket with that intention, without the consent of Ford, and did so convert it; and that this occurred in said county of Lee, within twelve months before the finding of the indictment; then the defendant is guilty." (2.) "In determining whether the defendant intended to steal the money, it is the duty of the jury to look at all the facts and circumstances in evidence; and if, from all the facts and circumstances in proof, and the legitimate conclusions to be drawn from them, the jury believe, beyond a reasonable doubt, that when the defendant received the money, and put it in his pocket, he did so with the purpose of feloniously taking it—intended to steal it—then he is guilty as charged." (3.) "The fact (if it be a fact) that defendant gave Ford a two-dollar bill, or the fact (if it be a fact) that Ford offered to take the pants and say no more about it, does not excuse the defendant for a wrongful taking of the five-dollar bill, if the original taking was with the intent to convert it to his own use, and against the consent of Ford." (4.) "If the defendant took from the prosecutor a five-dollar bill, commonly called *greenback*, of the value of five dollars, and put it in his pocket, with the intent to convert it to his own use, and without the consent of the prosecutor; and if this occurred in the county, and within twelve months before the finding of the indictment, then the defendant is guilty as charged."

The defendant excepted to each of these charges, and then

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requested the following charges: (1.) "If the jury believe all the evidence, they can not find the defendant guilty of larceny." (2.) "If a man takes away the goods or property of another openly before him, otherwise than by robbery, this carries with it evidence of a trespass only; because done openly in the presence of the owner, or of other persons known to the owner, it has not the intent to constitute larceny." (3.) "If the jury believe, from the evidence, that the prosecutor agreed to purchase of the defendant a pair of pants, at the price of two dollars, and handed him a five-dollar bill, out of which the defendant was to take the price of the pants, and return the remainder to the prosecutor, then the defendant can not be convicted of the larceny of the five-dollar bill." The court refused each of these charges, and the defendant excepted to their refusal.

WM. H. BARNES, for the appellant.—(1.) The indictment does not contain a sufficient description of the bill alleged to have been stolen, and the proof is as uncertain and indefinite as the allegations.—*Grant v. The State*, 55 Ala. 201; *Wesley v. The State*, 61 Ala. 287. (2.) On the facts proved, there could have been no intent to steal the bill, since the prosecutor was given the pants (and took the two-dollar bill instead), and was only entitled to the change; and the defendant could, at most, be guilty only of embezzling the change.—*Reg. v. Thomas*, 9 C. & P. 741; 39 N. Y. 459; *Johnson v. The State*, 73 Ala. 523; Bish. Crim. Law, vol. 2 p. 459; *B. v. The State*, 58 Ala. 414.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The defendant is charged with stealing "one five-dollar bill, commonly known and called *green-back*, currency of the United States, of the value of five dollars." It is insisted that this description of the thing alleged to have been stolen is obnoxious to the charge of uncertainty. The purpose of description is to identify, or individualize the transaction. To make a *prima facie* case, the indictment must show that the thing stolen was the subject of larceny. The certainty required must be such as to inform the defendant of the nature and cause of the accusation against him. The main purposes contemplated are, that he may prepare for his defense, and that the court may, on conviction, be enabled intelligently to pronounce the proper judgment.—*Grattan v. The State*, 71 Ala. 344; Code, 1876, § 4784. We judicially know that the paper money, commonly known as and called *green-back*, is a currency issued by or under the authority of the United States, and is so called from the back of the notes being



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of a green color. The term is more frequently applied to United States treasury-notes issued by the government, but is also sometimes used to designate the national currency, or bank-notes issued under its authority. The description of the bill alleged to have been stolen was, in our judgment, sufficient.—*Sallie v. The State*, 39 Ala. 691; 2 Bish. Cr. Proc. (3d Ed.), §§ 702–703; Whart. Cr. Pl. & Pr. § 189 *a*; *Grant v. The State*, 55 Ala. 201.

When one receives a bank-bill, or other money, to be changed, and places it in his pocket, with the fraudulent purpose at the time of appropriating it to his own use, and he refuses to re-deliver it, or the change, on request, the taking would be felonious, and, according to the better view, the transaction would constitute larceny. The possession of the bill is deemed to be parted with by the owner, only on condition that he is immediately to receive the change for it; the delivery of the bill, and the giving of change in return, being, in legal contemplation, simultaneous acts. This view is supported by *Bailey's case*, 58 Ala. 414, and also by many other well-considered authorities.—2 Bish. Cr. L. (7th Ed.), §§ 812, 817; *Round-tree's case*, 58 Ala. 381; *Hildebrand v. People*, 56 N. Y. 394; s. c., 15 Amer. Rep. 435; *Farrell's case*, 16 Ill. 506; Wharton Cr. Pl. & Pr. (8th Ed.), § 219.

The principle announced in *Johnson's case*, 73 Ala. 523, when properly understood, does not conflict with the foregoing views. There, the openness of the trespass rebutted the *animus furandi* necessary to constitute larceny. Here, the fraudulent conversion, accompanied by secrecy of motive, such as usually characterizes theft, renders the taking felonious.

The rulings of the court, when tested by these principles, appear to us to be free from error; and the judgment must be affirmed.

## Wright v. The State.

### *Indictment for Forgery.*

1. *What writing may be subject of forgery.*—A written instrument, purporting to be an order by one person to another, to “send the money by” the person in whose favor it is drawn, not specifying any amount, may be the subject of forgery (Code, § 4340), if it has the capacity to deceive or injure, as where the person to whom it is directed has money in his hands belonging to the person whose name is signed to it.

2. *Statute of frauds; promise to pay debt of another person.*—A promise by a county school superintendent to pay, out of the funds in his hands

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in his official capacity, a debt due by one of the teachers to a third person, which was contracted on the faith of the moneys in his hands, or which he might receive, is not within the statute of frauds (Code, § 2121, subd. 3).

3. *Sufficiency of verdict.*—Where each count in the indictment charges forgery in the second degree, a general verdict of guilty, not specifying the degree, is sufficient.

FROM the Circuit Court of Chambers.

Tried before the Hon. H. C. SPEAKE.

The defendant in this case, Jack Wright, was indicted for the forgery of a written instrument, which purported to be signed by B. T. Smith, directed to W. C. Bledsoe, and which was in these words: "Send the money by Jack; it will save exchange and post-office order. You would oblige yours respectfully." The indictment contained two counts, the first of which charged that the defendant, "with intent to injure or defraud, did falsely make, forge or counterfeit an instrument or writing, purporting to be the act of B. T. Smith, by which a pecuniary demand purports to be created, and which is as follows," setting it out; and the second, that, with like intent, he did "falsely make or forge an instrument or writing, purporting to be the act of B. T. Smith, which is in words and figures as follows," setting it out. The defendant demurred to each count of the indictment, on the ground that it charged no offense, and that the instrument set out was not the subject of forgery; and his demurrer being overruled, he pleaded not guilty. The jury returned a general verdict of guilty, and the court thereupon rendered judgment sentencing the defendant to hard labor for the county for two years.

On the trial, as appears from the bill of exceptions, the State introduced W. C. Bledsoe as a witness, who was the school superintendent of said county, and who testified to the presentation to him, on or about the 12th September, 1885, by the defendant, of the writing alleged to have been forged, which was produced; and that he paid the defendant \$39 on it. The defendant objected to the admission of the writing as evidence, and duly excepted to the overruling of his objection. The witness further testified, on cross-examination, that the defendant was one of the teachers of a public school in the county; that he was indebted to the defendant, at the time the order was presented to him, in an amount more than \$39, on account of salary due him as teacher, and had promised to pay several outstanding accounts against him, among which was an account due to said B. T. Smith, whose name was signed to the order; that there was no written agreement on his part to pay Smith, and no particular amount was specified; that this agreement was not made when he, Smith and the defendant were all together, but he saw each of them separately, and promised

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to pay the money to Smith under the instructions of the defendant. B. T. Smith was also introduced as a witness for the prosecution, and testified that he never signed the paper alleged to have been forged, and never saw it until it was shown to him by said Bledsoe; also, that the defendant owed him at that time more than \$39, on an account which was "contracted on the faith of the defendant's agreement that it should be paid out of the money to be earned by him as a school-teacher, which fact had been communicated to Bledsoe;" and that said Bledsoe had agreed verbally, but not in the presence of the defendant, to pay it.

On this evidence, the court charged the jury, "among other things, that, if they believed the evidence, the money in the hands of Bledsoe in equity and good conscience belonged to Smith, and Smith could have maintained an action for money had and received against Bledsoe for it." To this charge the defendant excepted, and then requested the following charges: (1.) "If the jury believe all the evidence, they must find the defendant not guilty." (2.) "The State must show that Smith was legally entitled to the money in the hands of Bledsoe, when the order was presented to him, or they can not find the defendant guilty." (3.) "If Bledsoe, as county superintendent, was indebted to the defendant for teaching school, and there was no written transfer of the amount by the defendant, then the jury must find the defendant not guilty." The court refused each of these charges, and the defendant excepted to their refusal.

DOWDELL & DENSON, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—By statute, any person, who falsely makes, forges or counterfeits, any instrument in writing purporting to be the act of another, by which any pecuniary demand or obligation purports to be created, increased, discharged or diminished, is guilty of forgery in the second degree.—Code, § 4340. The defendant was indicted for the forgery of an instrument, a copy of which is set out in the indictment. The writing described is an order for money. It purports to be signed by a person who professes to have control of the money, and is addressed to another, who, as the writing purports, is under obligation to send it, as directed. Whether the instrument, if genuine, would have created a pecuniary demand or obligation on the drawer, or would have operated as a discharge of the person to whom it is directed, from a liability for funds in his possession, or from a prior pecuniary demand, depends on the



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relations of the parties. In either event, it is well settled, that such an instrument is the subject of forgery.—*McGuire v. State*, 37 Ala. 161; *Jones v. State*, 50 Ala. 161; *Williams v. State*, 61 Ala. 33; *Anderson v. State*, 65 Ala. 553. It is not necessary that a definite sum of money shall be specified in the order.—2 East's P. C. 941; Bish. Stat. Cr., § 329.

2. If it were conceded that the promise of Bledsoe to pay Smith is within the statute of frauds, it would be immaterial. The instrument is the subject of forgery, if it may be used as proof *prima facie* in a suit, whether by or against the person whose name is forged. The material question is its capacity to work injury, though no one may in fact be prejudiced thereby. It is sufficient, if it may be regarded as a security for reimbursement, or a protection against future liability. But the promise of Bledsoe to pay Smith, out of funds in his hands as county superintendent, is not a promise to answer for the debt, default, or miscarriage of another. He was not the individual debtor of the defendant. He held the school funds in a trust and official capacity, a portion of which belonged to the defendant; and the promise is to pay Smith out of funds of the defendant in his possession, or which he may receive, a promise to pay the debt of the original debtor, with his own money—to perform an agency. That the debt of the defendant was contracted on the faith of an agreement that Smith should be paid out of the school funds, and Bledsoe's holding or reception of the money, constitute a sufficient consideration. *Hitchcock v. Lukens*, 8 Por. 333; *Westmoreland v. Porter*, 75 Ala. 452; *Coleman & Carroll v. Hatcher & Brannon*, 77 Ala. 217.

3. The verdict is sufficient to support the judgment.—*Anderson v. State*, 65 Ala. 553.

Affirmed.

## Garlick v. The State.

### *Indictment for Carrying Concealed Weapons.*

1. *Charge as to legal maxim favoring escape of innocent.*—A charge asked, in a criminal case, instructing the jury, "that it is a maxim of the law, that it is better for ten guilty men to escape than that one innocent man should suffer," tends to mislead them, and is properly refused.

FROM the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

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The defendant in this case was indicted for carrying concealed weapons, and pleaded not guilty, on which plea issue was joined. On the trial, as the bill of exceptions shows, a witness for the prosecution testified, that the defendant, at a particular time and place mentioned, "carried a pistol concealed about his person." The defendant, testifying in his own behalf, admitted that he carried a pistol at the time and place mentioned, but denied that it was concealed from observation; alleging that it was "in the upper pocket of his vest, two or three inches being exposed, and his coat being off." On this evidence, the defendant asked the court, in writing, to instruct the jury, "that it is one of the maxims of the law, that it is better for ten guilty men to escape than that one innocent man should suffer." The court refused this charge, and the defendant excepted.

O. KYLE, JR., for appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

STONE, C. J.—In charging juries, judges state the law, and they may state the evidence, when the same is disputed. It is their province, also, to state there is, or is not, testimony bearing on a given proposition; but they are not permitted to determine the weight or sufficiency of parol testimony, except in a given class of cases, when the general charge may be given, referring the credibility of the testimony to the jury. 1 Brick. Dig. 335. The judge also construes documentary testimony, and, as a rule, determines its weight. With these exceptions, and, possibly a few others, the jury is the sole judge of the weight and sufficiency of testimony. The charge to the jury is, and generally should be, confined to the statement of rules of law, and should have reference to the case the testimony tends to establish. If the testimony be in conflict, having different tendencies, the charge should declare the rules of law applicable to each such tendency. In thus declaring rules of law, there is frequently a wide range of duties opened up, which it would be difficult to summarize. When the exigencies of the case seem to require it, it would clearly include a statement of the burden of proof, rules for weighing testimony, the varying rule as to the sufficiency of proof in civil and criminal cases, and the rule and measure of recovery or punishment, as the case may be. In fact, everything that is matter of law, it is the province and duty of the court to declare.

The charge asked and refused in this case, can scarcely be classed as a rule of law, although found in some of the law-  
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books. It is rather to be viewed in the light of a caution to juries, not to indulge unwarrantable convictions of guilt, in the absence of that full measure of proof which dispels or overcomes all reasonable doubt. Moral certainty the law exacts as a condition of conviction, because it is better that many guilty persons escape, than that the innocent should suffer. It is the emphasis of that stern duty which demands moral certainty as the measure of proof, before the jury is authorized to render a verdict of guilty. Given in charge as a rule of law, the tendency is to mislead, and the Circuit Court did not err in refusing to charge as requested.—*Farrish v. The State*, 63 Ala. 164; *Mickle v. The State*, 27 Ala. 20; *Blackman v. The State*, 36 Ala. 295; *Coleman v. The State*, 59 Ala. 52; 1 Brick. Dig. 337, §§ 59, 60, 61; *Dorgan v. The State*, 72 Ala. 173; *Ming v. The State*, 73 Ala. 1; *Hughes v. The State*, 75 Ala. 31; *Childs v. The State*, 76 Ala. 93.

The judgment of the Circuit Court is affirmed.

## Martin v. The State.

### *Indictment for Carrying Concealed Weapons.*

1. *Limitation of prosecution.*—In a prosecution for a misdemeanor, to avoid the bar of the statute of limitations (Code, § 4644), on the ground that the prosecution was commenced before a justice of the peace before the expiration of twelve months, the indictment must be, in legal effect, a continuation of that prosecution; and where a warrant was issued by a justice, but the defendant, being arrested, failed to appear, and the default was thereupon certified to the Circuit Court, but no *alias* warrant was issued,—these facts do not avoid the bar of the statute of limitations, as against an indictment found after the expiration of twelve months.

FROM the Circuit Court of Lee.

Tried before the Hon. H. D. CLAYTON.

The indictment in this case was returned into court on the 12th November, 1884, and charged that the defendant carried a pistol concealed about his person. The defendant pleaded not guilty, and the statute of limitations; and issue was joined on these pleas. "On the trial," as the bill of exceptions states, "it was proved that the offense charged was committed on June 1st, 1883; that affidavit was made, and a warrant of arrest issued against the defendant, on said charge, on the 16th July 1883; that the defendant was arrested under the same, on the 6th November, 1883, and was brought before the magistrate



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issuing it, and a preliminary hearing was set for the 6th October, and the defendant admitted to bail; that the case was continued by the magistrate, on that day, until the 19th October, when it was called for hearing, but the defendant failed to appear, and a forfeiture was then taken against him and his sureties; and that no other or further proceedings were had by or before the magistrate, or any other orders or entries made by him in the case, except to send up the forfeited bond to the Circuit Court, where, on the 11th November, 1884," a judgment was rendered, on motion of the solicitor, setting aside the conditional judgment on the bond, on account of informalities. On these facts, the defendant asked several charges in writing, which instructed the jury, in effect, that the prosecution was barred by the statute of limitations of twelve months; and he duly excepted to the refusal of these charges.

GEO. P. HARRISON, Jr., for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The question raised by the rulings of the Circuit Court is, whether the prosecution was barred by the statute of limitations. The offense charged was a misdemeanor,—the carrying of a pistol concealed about the person of the defendant. It is shown to have been committed on the first day of June, 1883. The indictment was found on November the twelfth, 1884. It is obvious, therefore, that the bar was complete by reason of the lapse of more than twelve months since the commission of the offense, unless the proceedings before the justice operate to take the prosecution out of the operation of the statute.—Code, 1876, § 4644.

The section of the Code relied on to accomplish this result is section 4646, which provides, that "a prosecution may be commenced, within the meaning of this chapter, by the issue of a warrant, or by binding over the offender."

We are of the opinion, that this statute contemplates that there must be some connection between the prosecution before the justice, and the one in the Circuit Court, before the former can operate to suspend the running of the statute. The indictment, in other words, must be the continuance, in legal effect, of what was commenced or originated before the justice. One legal proceeding can in no sense be said to be the commencement of another, when the two are so far separate and distinct as to be entirely without continuity or connection.

We see no such connection in the present case. The prosecution commenced before the magistrate, on the sixteenth of July, 1883, by the arrest of the defendant under a warrant,

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seems to have terminated in that court, by the failure of the defendant to appear, resulting in a forfeiture of his bond, which was an obligation to appear at a time stated before the magistrate. It was the magistrate's duty to issue an *alias* warrant for the re-arrest of the defendant, and in this way to have continued the prosecution.—Code, 1876, § 4676. Certifying the default on the undertaking of bail, and returning this to the Circuit Court, was designed merely to inaugurate a civil suit in that court against the obligor and his sureties on the bond.—Code, 1876, § 4676.

Where the offense is one within the final jurisdiction of the magistrate, the prosecution is required to be commenced within sixty days next after the commission of the offense.—Code, § 4645. In such a case, the issue of the warrant is the commencement of the prosecution.—Code, 1886, § 4646, *supra*. Where the offense is one within the jurisdiction of the Circuit Court, and is not within the final cognizance of the magistrate, there must be a binding over of the defendant, resulting in a continuance of the prosecution in that court by indictment. *Molett v. The State*, 33 Ala. 408; *Foster v. The State*, 38 Ala. 425.

The rulings of the Circuit Court were opposed to this view of the law. The judgment is reversed, and a judgment will be entered in this court, discharging the defendant from further custody.

## McCord v. The State.

### *Indictment for Statutory Trespass on Lands.*

1. *Statutory trespass on lands, cutting trees, &c.; intent to convert.* Under the statute which makes it larceny for any person to enter on the lands of another, without his consent, and cut and carry away any timber or rails, "with the intention of converting them to his own use" (Code, § 4360), the specific intent is a material ingredient of the offense, and must be alleged in the indictment.

FROM the County Court of Macon.

Tried before the Hon. P. S. HOLT.

This case originated in the Circuit Court, and was transferred to the County Court. The indictment charged that the defendants "did knowingly, willfully, and without the consent of Mary C. Burks, she being the owner thereof, enter upon the lands of Mary C. Burks, and cut and carry away three pine

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trees, the same being timber of the value of five dollars; against the peace," &c. The defendants demurred to the indictment, "because it charges no offense," and "because it does not aver that the act charged was done with the intention of converting the said trees to his or their own use;" and their demurrer being overruled, they pleaded not guilty. A motion in arrest of judgment, on the ground that the indictment was fatally defective, for the same reasons specified in the demurrer, was overruled and refused. These rulings, with other matters, are now assigned as error.

GEO. P. HARRISON, Jr., for appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

CLOPTON, J.—An indictment, framed under a statute which creates an offense and prescribes its constituent elements, must allege all the circumstances or ingredients, which enter into the essential description of the offense. If the intent is a statutory constituent, not only the acts, in the doing of which the offense consists, but the intent with which they are done, must be alleged. Proof of the intention, without an allegation, is not sufficient.—*Eubanks v. State*, 17 Ala. 181; 1 Bish. Crim. Proc. § 521; *Davis v. State*, 68 Ala. 58.

The statute on which the indictment is found declares: "Any person who, knowingly, willfully, and without the consent of the owner thereof, enters upon the lands of another person, and cuts and carries off any timber or rails, with the intention of converting the same to his own use, if the property is of the value of twenty-five dollars or more, is guilty of grand larceny; and if the value of the property is less than twenty-five dollars, the offender is guilty of petit larceny." Code, § 4360. The evil "*intention of converting the same to his own use*" is necessary to convert the prescribed acts into a crime. The indictment, omitting an allegation of the statutory intention, fails to charge an offense.

Reversed and remanded.



## Campbell v. The State.

### *Indictment for Illegal Sale of Spirituous Liquors.*

1. *Constituents of offense.*—Under an indictment for selling spirituous liquors without a license, and contrary to law (Code, § 4204; Sess. Acts 1878-9, p. 71), a conviction can not be had against a person who had no interest in the liquor sold, nor in the money paid for it, and who acted only as the agent or friend of the purchaser in procuring the liquor.

FROM the Circuit Court of Etowah.

Tried before the Hon. JAMES AIKEN.

STONE, C. J.—The indictment in this case was framed under the act “to amend section 4204 of the Code of Alabama,” approved December 3, 1878.—Sess. Acts, 71. The offense charged is, that the defendant “sold vinous or spirituous liquors, without a license, and contrary to law.” The proof fails to show that the defendant made the sale, or was interested in it; and it also fails to show that he had any interest in the liquor, or in the money paid for it, either before or after the sale. It does tend to prove that he was the agent, or assisting friend of Foster, the purchaser, and assisted him in making the purchase. His guilt, therefore, could not be greater than that of Foster, the buyer; and it would not be pretended that Foster either sold, or aided in the sale the testimony tends to prove was made.

The ruling of the court, alike in the charge given and in the refusal to charge, can not be reconciled with the decision of this court in *Young v. The State*, 58 Ala. 358, and is erroneous.

Reversed and remanded.

## Tarpley v. The State.

### *Prosecution for Enticing away Servant.*

1. *Constitutionality of statute creating and punishing offense.*—At common law, an unauthorized interference by a third person with the contractual relations existing between master and servant, was an action-

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able tort; and the statute making it a misdemeanor, under certain circumstances, punishable by fine (Code, §§ 4325-27; Sess. Acts 1880-81, p. 42), is not an indirect attempt to punish the violation of a contract by fine and imprisonment, nor otherwise objectionable on constitutional grounds.

2. *Constituents of offense.*—When the contract of hiring is within the terms of the statute, and has not expired, it is as much a violation of the statute to hire the servant or laborer *after* as *before* he has abandoned the service of the master; but, *it seems*, knowledge by the defendant of the existence of the contract is a necessary element of the offense.

3. *Misnomer; plea in abatement, of pending prosecution.*—There is a material variance between the names *Tarpley* and *Tapley*, which would support a plea in abatement on the ground of misnomer; consequently, a pending prosecution against the defendant, by the latter name, can not be pleaded in abatement of a prosecution by the former.

FROM the County Court of Macon.

Tried before the P. S. HOLT.

The warrant in this case, by which the prosecution was commenced, was founded on an affidavit made by W. R. Ivey, May 19th, 1885, which charged that “William Tarpley did knowingly interfere with, hire, employ, entice away, or induce to leave the service of affiant, Dan Ellington, who had contracted in writing to serve affiant for a given time, not exceeding one year, before the expiration of the time so contracted for.” The defendant filed a plea in abatement, setting out another prosecution pending against him for the same offense; which was commenced by indictment, and in which the defendant was described as William *Tapley*. The court sustained a demurrer to this plea, and the defendant then pleaded not guilty; on which plea issue was joined, and a trial had.

On the trial, as appears from the bill of exceptions, said Ivey, the prosecutor, exhibited the written contract between himself and said Dan Ellington, by which the latter agreed to work for him, as a farm laborer, from the 19th January to the 1st August, 1885, for \$50 and his food; and he testified, that said Ellington voluntarily left his service on the 23d March, and hired himself to the defendant on the next day; that he, witness, then went to see defendant, who lived near by, and notified him that said Ellington was under written contract to work for him until the 1st August, and asked him to discharge said Ellington from his service; that defendant refused to discharge Ellington, and said that Ellington had told him, at the time of the hiring, that said Ivey had broken his contract with him; which said Ivey thereupon denied, and insisted on the discharge of Ellington by the defendant. The defendant offered evidence tending to show that, when he hired Ellington, “he knew that said Ellington was under contract to work for said Ivey, but did not know that the contract was in writing

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until Ivey told him so ; that he had nothing to do with Ellington's leaving the service of Ivey ; and that Ellington, when coming to him for employment, told him that Ivey had broken his contract with him."

On this evidence, the defendant asked the court to charge the jury as follows: (1.) "If the jury believe, from the evidence, that Ellington had quit the service of Ivey, and had repudiated the contract, if he did so ; and if they believe that defendant had nothing to do with said quitting and said repudiation, but hired Ellington after he had so quit and abandoned his contract,—then the defendant is not guilty." (2.) "If the defendant employed Ellington after he had quit the service of Ivey, and had repudiated the contract with Ivey ; and that the defendant had nothing to do with the quitting and repudiation, but hired Ellington in good faith, believing that he had a right to do so,—then the defendant is not guilty." The court refused each of these charges, and the defendant excepted to their refusal.

W. F. FOSTER, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J'.—The defendant was convicted of violating section 4325 of the present Code, as amended by the act of February 15, 1881.—Acts 1880–81, p. 42. This statute provides, that "any person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, any laborer or servant, who has contracted in writing to serve such other person for any given time, not to exceed one year, before the expiration of the time so contracted for," without the consent of the employer, given either in writing or in the presence of some credible person, shall be guilty of a misdemeanor, and be punished by fine, the amount of which is specified. We omit the residue of this section, having reference to the employment of minors, as it has no bearing on this case.

1. It is contended that the act is unconstitutional, as an indirect attempt to punish by fine and imprisonment the violation of a contract. This is an erroneous view of the statute. It imposes no imprisonment for debt on any one, either directly or indirectly. It is not aimed at either the employer or the employee. It does not seek to punish the act of either contracting party, by which he fails or refuses to perform his obligation assumed to the other. The law is designed to prevent the tortious interference of strangers with the lawful contracts of master and servant, or employer and employee,



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when such contracts are reduced to writing.—*Driscoll v. The State*, 77 Ala. 84. Under the rules of the common law, it was an actionable tort for any one to knowingly interrupt the contractual relations existing between master and servant, either by procuring the servant to leave the master's service, or by afterwards harboring or keeping him as a servant, during the stipulated period of service. The very act of giving the servant employment, in such a case, affords him the means and encouragement to keep out of the former service to which he has voluntarily bound himself.—2 Addison on Torts, Wood's Ed., § 1272. This being so, the act of one who violates the provisions of this statute, would be a tort; and a civil liability created by it would be one for the enforcement of which the General Assembly could constitutionally impose imprisonment.—*Ex parte Hardy*, 68 Ala. 303; *Lee v. State*, 75 Ala. 29.

2. The statute, in our opinion, very clearly prohibits the hiring of a servant or laborer after he has abandoned the service of the master, as well as before, provided the hiring be within the term of service covered by the written contract, and before its expiration.—Code, 1876, §§ 4325, 4327. The two charges requested by the defendant, assumed the contrary to be the law, and were properly refused.

It may be true, as contended in argument, that no conviction can be had under this section, unless the defendant, at the time of the hiring, knew of the existence of a written contract of service between the employer and employee; but there is no ruling of the court found in the record which raises this point.

3. The sustaining of the demurrer to the defendant's plea in abatement was obviously free from error. The present prosecution is against William *Tarpley*. The one shown to be pending in the same court, and sought to be pleaded in abatement, is against William *Tapley*, who, in legal contemplation, is another and different person. This variance in name is a misnomer, which would be fatal to conviction of the defendant under the first indictment.

No error appears in the record, and the judgment must be affirmed.

[Ex parte City Council of Montgomery, in re Bandy.]

## ***Ex parte City Council of Montgomery, in re Bandy.***

### *Application for Certiorari, in matter of Discharge on Habeas Corpus.*

1. *Municipal ordinance construed, as to sentence to fine and hard labor.* The municipal ordinance of the city of Montgomery, providing that any person convicted of a violation of any by-law or ordinance of the city "may be punished by fine or imprisonment, or by fine and imprisonment, or by hard labor upon the streets or public works of the city," does not authorize the imposition of a money fine *and* a sentence to hard labor for one and the same offense; though hard labor may, under the provisions of another ordinance, be imposed on non-payment of the fine.

APPLICATION by petition, in the name of the City Council of Montgomery, for the writ of *certiorari*, to bring before this court for review the proceedings had before Hon. F. C. RANDOLPH, the judge of probate of Montgomery county, discharging one Peter Bandy from the custody of the municipal authorities of the city of Montgomery, on *habeas corpus*. The opinion states the facts.

J. M. FALKNER, for the petitioners.

JNO. GINDRAT WINTER, *contra*.

STONE, C. J.—Peter Bandy was tried before the mayor of the city, and convicted of larceny. He was sentenced to pay a fine of one hundred dollars and the costs of the prosecution, and, in addition thereto, was sentenced to six months hard labor for the city; and in default of payment of fine and costs, he was sentenced to hard labor for the city ——— days. He was put to labor on the streets of the city, in what is known as the "chain-gang." He thereupon sued out a writ of *habeas corpus* before Judge RANDOLPH, who made an order discharging him from custody. The present proceeding is an application for a *certiorari* from this court, to have the proceedings before Judge Randolph certified to this court, and here quashed.

The ordinance of the city which prescribes the modes of punishment that may be inflicted for violations of its by-laws, is in the following language: "That any person convicted for

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the violation of the by-laws or ordinances of the city of Montgomery, may be punished by fine or imprisonment, or by fine and imprisonment, or by hard labor upon the streets or public works of the city, or for the city." There is a further provision, that the fine shall not exceed one hundred dollars, and the sentence to imprisonment or hard labor shall not exceed six months. Under this ordinance, can there be, for one and the same offense, a sentence of both a money fine and to perform hard labor? We think not. The ordinance gives the option of inflicting a money fine, or imprisonment, one or both. It likewise gives the option of sentencing to hard labor. It gives no such option, however, when either a money fine or imprisonment has been imposed, except as a means of coercing the payment of the fine and costs. Its language is, "and in event the fine and costs are not presently paid, [the offender] may be required to work out the fine and costs under the direction of the city authorities." A money fine having been assessed, and the minute of the judgment showing that the sentence to hard labor was imposed as additional punishment, and not as a means of collection, it was beyond the power and jurisdiction of the municipal court, and the probate judge did not err in discharging the prisoner.

The writ of *certiorari* is denied.

## Ashurst v. The State.

### *Indictment for Retailing Spirituous Liquors without License.*

1. *Local prohibitory law in charter of manufacturing company.*—The 4th section of the act incorporating the Tallassee Manufacturing Company Number One, approved January 29th, 1852, which makes it a misdemeanor for any person to sell intoxicating liquors, "by retail or otherwise, within four miles of the factories of said corporation," became operative as soon as the factories of the corporation were erected; and it still continues of force as a valid legislative enactment, though all the property of the corporation has been sold under a decree in chancery, and the purchasers are carrying on the same business there under a new corporate name.

FROM the Circuit Court of Tallapoosa.

Tried before the Hon. JAMES E. COBB.

The indictment in this case charged, in a single count, that the defendant "sold vinous or spirituous liquors, without license, and contrary to law." A trial was had on issue joined on the plea of not guilty, which resulted in a verdict and judg-



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ment against the defendant. On the trial, he reserved a bill of exceptions, as follows: "The State proved that the defendant sold spirituous liquors to sundry persons in said county, within twelve months before the finding of the indictment, and within four miles of a certain building known as the *Tallassee Factory*; and introduced in evidence the act incorporating the *Tallassee Manufacturing Company Number One* (1), approved January 29th, 1852; and proved, in connection therewith, that prior to said 29th January, 1852, there had been for many years a cotton factory, frequently called the *Tallassee Factory*, located at the same point where the building first shown in evidence is located, and which was owned and operated by a private partnership under the name of Barnett & Marks, composed of Thomas M. Barnett and William Marks; that said Barnett & Marks, soon after the passage of said act of January 29th, 1852, conveyed to said corporation all the property of said partnership, including said building and the land on which it was situated; that said corporation, soon after said conveyance, erected another building near the first, which two buildings have ever since, up to the present time, been used for the manufacture of cotton, and have been commonly known and called the *Tallassee Factory*; that said corporation continued to do business, under its said corporate name, until 1874, when it became insolvent, and assigned all its property, for the benefit of its creditors, to Pollard and others; that said insolvent estate was administered by the Chancery Court, and all the property of the corporation was sold, by decree of the court, in 1876, at which sale certain persons purchased said buildings and lands, and afterwards organized as a corporation, under the general statutes of Alabama, under the name and style of *Tallassee Falls Manufacturing Company*, and conveyed all said property to said new corporation, which has ever since held and owned said property, and operated the same under said corporate name; and that since said sale under the chancery decree, in 1876, said *Tallassee Manufacturing Company Number One* has never done any business, nor any corporate act whatever, and has owned no property whatever. The defendant read in evidence a license issued to him by the judge of probate of Tallapoosa, authorizing him to sell liquor during the year 1885 at the place of his business; which license was in all respects regular and sufficient as required by the revenue law of Alabama. This being all the evidence, the court charged the jury, on request of the State, that they must find the defendant guilty, if they believed the evidence; to which charge the defendant excepted."

GUNTER & BLAKEY, and WM. H. BARNES, for the appellant.

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THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The defendant was indicted for selling spirituous liquors without license, and contrary to law. He justified under a license, which the court, in effect, pronounced to be void, because of the existence of a prohibitory liquor law, which, in the opinion of the court, was of force within four miles of the factory of the Tallassee Falls Manufacturing Company.

It is our opinion that this ruling of the court was free from error.

The prohibitory law in question derived its origin and force from an act of the legislature, approved January 29, 1852, entitled "An act to incorporate the Tallassee Manufacturing Company Number One," which may be found in the Session Acts of 1851–52, pp. 262–264. It was enacted, in section 4 of this law, that "if any person or persons shall sell ardent, spirituous, or intoxicating liquors, within four miles of the factories of said corporation, by the retail or otherwise, such person or persons shall be subject to indictment in the Circuit Court of the county in which such selling or retailing was done, and be liable to all the pains and penalties then in force against retailing without license."

The case presented, in the first instance, is the familiar one of a law enacted by the legislative department of the government, which was to take effect upon a contingency. This contingency was, by necessary implication, the corporate organization of, and commencement of business by the company, evidenced by the construction and operation of a factory or factories. When this event transpired, the law was immediately put in force, and was as valid as if the legislature had expressly prohibited the sale of spirituous liquors within four miles of the place where these factories were located. It became at once a fixed rule of conduct, prescribed by the supreme power of State, and operating upon all persons within the locality. How could its operation be suspended or destroyed, except by a new act repealing it, or by its expiration from some fact which limits its continued existence as a law of the land? It is not contended that the act has been repealed, either expressly, or by any repugnant statute. The only contention is, that it has ceased to operate because the property of the corporation in question was sold out, under the decree of the Chancery Court, and purchased by private persons, who have organized another corporation, which continues the same business, in the same locality, under the name of the Tallassee Falls Manufacturing Company. This repeal, thus contended for, is one by implication, which is not favored by the law. The

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argument for it is based on the idea, that the law was a chartered privilege of the dissolved corporation, and did not attach to the locality after its dissolution. We see nothing to justify this construction. The reason for the continuance of the law is just as great after the old company ceased to exist as before, in view of the fact that its purpose was to protect the owners and employees of a factory against the evils incident to the sale of intoxicating liquors, and the same kind of business has been continued in the same place by the owners of the same property.

The charge of the court being free from error, the judgment is affirmed.

CLOPTON, J., not sitting.

## Weaver v. The State.

*Indictment for Abusive or Insulting Language in or near Dwelling-house, in presence of Family.*

1. *Sufficiency of indictment.*—In an indictment for using abusive, insulting or obscene language, in or near a dwelling-house, or in the presence of women (Code, § 4203; Sess. Acts 1880-81, p. 30), it is sufficient to pursue the language of the statute, and is not necessary to specify the words used.

2. *Ownership of house; averment and proof of.*—When a widow marries again, and removes with her husband from her former residence, leaving her children by the first marriage in possession, the house may be described in an indictment as their dwelling-house.

3. *What words constitute offense.*—When the defendant, whose wife had left him, went to the house in which her children by a former marriage lived, searching for her, and, on leaving, was told by one of them not to come there again; to which he replied, “*I’ll go where I dam please, and it don’t make a dam bit of difference where it is;*” held, that these words would support a prosecution under the statute.

FROM the Circuit Court of Chilton.

Tried before the HON. JAMES E. COBB.

The indictment in this case was found in October, 1883, and charged, in its first count, “that Albert Weaver did enter into, or go sufficiently near the dwelling-house of Robert C. Lenoir, Josie Lenoir, and Lulu Lenoir, and in the presence, or within the hearing of the occupants of said dwelling-house, or of some member of said family, and made use of abusive, insulting, or obscene language;” and in the second count, that he went into



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or near "the dwelling-house of Robert C. Lenoir, and in the presence, or within the hearing of the family of the occupant thereof, and made use of abusive, insulting, or obscene language." The defendant demurred to the first count of the indictment, on the ground that it was uncertain and indefinite, and charged no offense; and because there was no sufficient description of the house, or averment of ownership. The court overruled the demurrer, and the defendant then pleaded not guilty, on which plea issue was joined.

On the trial, as the bill of exceptions shows, the State introduced as witnesses said Robert C. Lenoir, and his two sisters, named in the indictment, who testified, in substance, that the defendant married their mother in February, 1883, and lived in the house with them for several months, "it being the dwelling-house of a former husband of their mother;" that he and his wife then moved out of the house, into a smaller house on the premises, which was about one hundred and fifty yards distant from said dwelling-house, "telling them to remain in the house, and to support themselves; that said Robert C. was at that time about nineteen years of age, and he took charge of the household, which consisted of himself and his said two sisters, who were younger than he was;" that the defendant's wife left him some time afterwards, and, on the same day, he came to their said house in search of her, and searched through it, turning up the beds, and going through all the rooms, but did not find her; that when he got out, or was going out of the house, Josie Lenoir, who was about eighteen years of age, said to him, "Mr. Weaver, don't come here any more;" to which he replied, as she testified, "*I'll go where I dam please, and it don't make a dam bit of difference where it is;*" or, as the other witnesses testified, "*I'll go where I God dam please.*" The testimony tended to show, also, "that the children were opposed to their mother's marriage with the defendant, and their feelings to the defendant were not kind; and that the manner and language of the defendant, on said occasion, was rude and angry."

On this evidence, the defendant asked the court to instruct the jury, "that if they find the only language used by the defendant was as testified by Miss Josie Lenoir, in reply to her telling him not to come there any more, then this language is not a violation of the statute." The court refused to give this charge, and the defendant excepted to its refusal.

WATTS & SON, for the appellant.

THOS. N. McCLELLAN, Attorney-General, for the State.  
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STONE, C. J.—The indictment pursues the language of the statute, and is sufficient.—Sess. Acts 1880–1, p. 30; *Yancey v. State*, 63 Ala. 141.

No question is raised by the record as to the ownership or occupancy of the dwelling, described in the indictment as the dwelling-house of Robert C. Lenoir and others named. Conceding that it had been the dwelling-house of Mrs. Weaver's former husband at the time of his death, and that it thence became her dwelling by virtue of her quarantine rights, this was in her a mere privilege to occupy until dower was assigned her. It gave her no title. The title was in the heirs of the deceased husband. She was not compelled to remain in possession; and if she ceased to occupy it, it ceased to be her dwelling-house. The question, whose dwelling-house it was, raised an inquiry of fact, and not of law. The court was not asked to rule upon it; and if there had been such request, it would seem that the finding must necessarily have been, that it was, at the time, the dwelling of Robert C. Lenoir and his sisters, and not of Weaver and wife. They had voluntarily abandoned it as a dwelling, and had acquired another; and whether Lenoir and sisters had title or not, the testimony tends to show it had become their dwelling-house by the act and consent of Weaver himself.

In the charge asked, no inquiry is presented as to the ownership or occupancy of the dwelling. It takes the broad ground, that the language imputed is neither "abusive, insulting, nor obscene," irrespective of the place at which it was spoken, or of the attending circumstances. The testimony, as we have shown, tended to prove that the house was the dwelling of the Lenoirs. If so, they had the right to warn Weaver not to enter it, and to forbid his doing so. Giving him such warning, gave him no cause of offense; and if he, in reply, uttered the language testified to by either of the witnesses, we can not affirm, as matter of law, that this was not insulting. It was, at least, a threatened defiance of the warning he had received, not to come again on the premises. This, of itself, would be insulting to the average householder. The language was coarse in itself, and may have been uttered in a very defiant, or insolent manner. The Circuit Court did not err in refusing to give the charge asked.

Affirmed.

## Bryant v. The State.

### *Indictment for Grand Larceny.*

1. *Motion to quash indictment; inquiry into evidence before grand jury.* The general rule is, that the refusal of the lower court to quash an indictment on motion is not revisable on error; and if such motion may be sustained, when it is shown that there was no evidence before the grand jury, the court may properly refuse to enter into an inquiry into the sufficiency of the evidence to sustain the finding.

FROM the Circuit Court of Barbour.

Tried before the Hon. JOHN M. CHILTON.

The defendant in this case was indicted for the larceny of 300 lbs. of seed-cotton and 250 lbs. of lint-cotton. "On the trial," as the bill of exceptions states, "the defendant moved to quash the indictment, because there was no legal evidence before the grand jury which found it, as to the commission of the offense charged." On the trial of this motion, one McLane was examined as a witness, who was the only witness before the grand jury, and who stated that his testimony was in substance as follows: that he had the custody of the cotton as agent of the owners, and had it stored in two outhouses; that the cotton was missing one morning, and he had a warrant issued for the arrest of the defendant on suspicion; that the defendant left the county, and was absent for several months, but was arrested after his return, and committed to jail; and that while so in custody, being advised by him (witness) to tell all about it, the defendant admitted that he and another person committed the larceny. On this evidence, the court overruled and refused the motion to quash; and the defendant excepted.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—The general rule is, that the refusal of a presiding judge to quash an indictment is not revisable in this court on error.—*State v. Jones*, 5 Ala. 666; 1 Bish. Cr. Proc. (3d Ed.), § 761; *Nixon v. The State*, 68 Ala. 535. Admitting, however, that the present case belongs to a class constituting an exception to this rule, we are of opinion that the motion to quash was properly overruled. The record does not present a case where the indictment was found by the



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grand jury without any evidence of witnesses, which is often held to be good ground for quashing. The effort is merely to institute an inquiry into the sufficiency of the evidence introduced before the grand jury to sustain the finding of the indictment.—*Sparrenberger v. The State*, 53 Ala. 481. The Circuit Court properly refused to enter into such an investigation, and its judgment is affirmed.

## Howell v. The State.

### *Indictment for Assault and Battery.*

1. *Self-defense*.—When two persons meet together, mutually use insulting words, and then fight willingly, or by mutual consent, it is immaterial which commenced the quarrel, and neither can set up the plea of self-defense; nor can he who provoked the quarrel set up that defense, being regarded as the aggressor, although he afterwards fought unwillingly; but he who is not the aggressor, merely using abusive words in reply to such words, and not fighting willingly, may protect himself from assault and injury, by opposing force with force so far as may be necessary.

FROM the Circuit Court of Shelby.

Tried before the Hon. S. H. SPROTT.

The defendant in this case was indicted for an assault and battery on one H. A. Davis, and was tried on issue joined on the plea of not guilty. On the trial, as the bill of exceptions states, the State introduced evidence "tending to show that, in the 'Coalings' in Shelby county, within twelve months before the finding of the indictment, the defendant and said Davis met; that Davis said, 'who is going to fill this hearth?' to which defendant replied, that he was, and that Mr. Nelson had sent him to do it; that Davis said, 'You are a grand liar,' and defendant, 'You are another;'; that each repeated several times the words 'You are another,' when Davis picked up a stick, and defendant started towards a pile of rocks, as if to get one, but stopped, and picked up a stick of wood; that Davis advanced towards defendant, and struck him, and defendant struck him with the stick of wood, and then both parties clinched and fought for some time. The defendant testified to the same facts, except that he said the hearth belonged to Mr. Nelson, and that Mr. Nelson had sent him to fill it; and he offered to prove by said Nelson that he had employed him to fill the hearth," and duly excepted to the exclusion of Nelson's testimony as offered. "This was all the evidence, and the

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court thereupon charged the jury, that when two persons meet and quarrel, and bandy opprobrious or insulting words, giving each other the lie, and a fight ensues, neither can set up the plea of self-defense; and if such was the evidence in this case, it would make no difference whether Mr. Nelson sent the defendant there or not." The court charged the jury, also, "that if Davis called the defendant a liar, and the defendant called him another, and they quarrelled, and a fight followed; then the defendant is guilty as charged, although Davis may have called him a liar first, and may have struck first; and the defendant can not, under these facts, plead self-defense." The defendant excepted to each of these charges as given, and also to the refusal of each of the following charges, which were asked by him in writing: (1.) "If the jury believe, from the evidence, that the defendant struck Davis after Davis had struck him, then he was justified, no matter if the lie had passed between them." (2.) "If the jury believe, from the evidence, that the defendant was rightfully upon the place where the difficulty occurred, and was attacked by Davis while there; then defendant was authorized by law to repel force by force, and to protect himself against any assault which he did not himself bring about." (3.) "If the jury believe, from the evidence, that Davis assaulted the defendant while the latter was rightfully at the place where the difficulty occurred; then, although the defendant may have called Davis a liar, he was authorized by law to repel any force that might have been used by Davis, provided he did not enter willingly into the difficulty, and provided further he did not make the first assault." These are the only rulings to which exceptions were reserved.

THOS. N. McCLELLAN, Attorney-General, for the State.

SOMERVILLE, J.—It is true that, where two persons meet together, and quarrel by bandying opprobrious or insulting words, and then fight each other willingly, or by mutual consent, it is immaterial which of them commenced the quarrel, for neither can set up the plea of self-defense. If the place of the fighting be public, each would be guilty of an affray; if private, of an assault and battery.

So, the combatant who provokes a difficulty, by using the first words of insult, or otherwise, being regarded as the aggressor, can not plead that he afterwards struck in self-defense, whether he fought willingly or unwillingly. But not so with the one who merely answers one verbal insult or abusive epithet with another. This does not deprive him of the privilege of afterwards defending himself without being amenable to the law, provided he did not fight willingly, or by his volun-

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tary consent. Not being the author or originator of the difficulty, he may still protect his person from assault and injury, by opposing force to force so far as may be necessary, taking care that he uses no more violence than is requisite to repel the attack upon him ; in other words, that his defense does not degenerate into aggression.

The rulings of the court not being in harmony with this view of the law, the judgment must be reversed, and the cause remanded.

## **Forcheimer & Co. v. Kaver.**

### *Motion to re-tax Costs.*

1. *Fees of witnesses summoned but not examined ; re-taxation of costs.* The fees of witnesses summoned by the successful party, but not examined by him, can not be taxed as a part of the cost in his favor, unless he shows to the court, by affidavit or otherwise, that there was a real or apprehended necessity for them ; and when improperly included, the unsuccessful party may have the costs re-taxed under the statute (Code, § 3146), which is but a substantial affirmation of the pre-existing rule.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

This was a motion for the re-taxation of costs, made by the appellants, who were plaintiffs in an action against James Kaver, and were unsuccessful ; the motion specifying the names of eight witnesses, who were alleged to have been summoned by the defendant, but were not examined on the trial, nor any reason shown for having them summoned. "On the hearing of the motion," as the bill of exceptions states, "there was evidence showing that the said witnesses named were summoned by the defendant to appear at the trial, and did appear and attend ; that the clerk issued to each of them certificates for their attendance, amounting in the aggregate to \$55.25 ; that they were not called or examined on the trial, and that the plaintiffs had paid the certificates of all the witnesses who were called and examined. This being all the evidence submitted on the hearing, the court overruled said motion, and refused to tax the defendant with said witness-certificates, or with the clerk's or the sheriff's costs for issuing and serving the same." The plaintiffs excepted to this ruling, and they here assigned it as error.



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OVERALL & BESTOR, for appellant, cited *Briley v. Hodges*, 3 Porter, 333 ; Code, § 3146.

G. L. SMITH, *contra*.—The evidence adduced did not show that the witnesses were summoned to testify as to the same matter ; nor, if that were shown, does it negative the existence of special circumstances justifying it. Witnesses are frequently summoned to prove material facts, but are not examined because those facts are admitted on the trial, or because some ruling on another point renders their testimony immaterial ; but the party summoning them, if successful, is entitled to his costs.—*Smith v. Donelson*, 3 Stew. & P. 395. Error can not be imputed to the court, in the absence of proof as to all the facts in the original suit.

CLOPTON, J.—Section 3146 of the Code provides: “If the taxation of costs be excessive, by charging the costs of witnesses who were not examined, or by charging costs to an improper party, or taxing costs contrary to law, the party aggrieved may move the court for a re-taxation, setting forth the particulars in which the clerk has erred.” The section is a substantial affirmation of the rule laid down, independent of statute, in *Porter v. Williams*, 22 Ala. 525, where the successful party, who had summoned nineteen witnesses, and examined only one of them, was taxed with the costs of the other eighteen, on failure to show a reason to apprehend any necessity to use them. There is an implied prohibition to tax in the bill of costs witnesses summoned by the successful party, and not examined.

The successful party is entitled to full costs, unless otherwise directed by law ; and may have taxed against his adversary the costs of witnesses summoned by him but not sworn, on showing, by affidavit or otherwise, that the purpose is not to oppress his adversary, but because they may become material in consequence of the anticipated disclosure of certain facts. *Briley v. Hodges*, 3 Por. 333. The taxation in the bill of costs, of witnesses summoned by the successful party and not examined, is *prima facie* excessive. On proof being made by appellant that the clerk had taxed the costs of witnesses summoned by appellee and not examined, the court should have re-taxed the costs of such witnesses, in the absence of any showing of a real or reasonably apprehended necessity to use them.

Reversed and remanded.

**Eslava v. Jones.***Motion to dismiss Appeal.*

1. *When appeal lies.*—A judgment sustaining a demurrer to the complaint, and taxing the plaintiff with the costs of the motion, is not such a final judgment as will support an appeal.

APPEAL from the Circuit Court of Mobile.

The record does not show the name of the presiding judge.

This action was brought by Odyle Eslava against Richard E. Jones, clerk of said Circuit Court, to recover damages on account of his careless, negligent and wrongful act, as alleged, in issuing a writ of *venditioni exponas*, under which certain lands, claimed by the plaintiff as a homestead exemption, were sold. A demurrer was interposed to the complaint, and was sustained by the court, the judgment being in these words: "The demurrers in this case having been argued by counsel, and submitted to the court for decision; it is considered and adjudged by the court, that the defendant's demurrers to the plaintiff's complaint be, and the same are hereby sustained, and the plaintiff is taxed with the costs of this motion." The appeal was sued out from this judgment, and it was here assigned as error. A motion to dismiss the appeal was submitted by the appellee.

PILLANS, TORREY & HANAW, for the motion.

S. P. GAILLARD, *contra*.

PER CURIAM.—The only judgment found in this record is an order of the court sustaining defendant's demurrer to plaintiff's complaint, and adjudging the costs of the motion against plaintiff. This is not a judgment disposing of the cause. There is no final judgment from which an appeal will lie, and the motion to dismiss the appeal is granted.

**McMahon v. Williams.***Bill in Equity for Injunction to enforce and protect Easement in Land.*

1. *Jurisdiction of equity to enforce and protect easement in land.* When an easement or servitude in lands is created by deed imposing a lawful restriction upon their use, a court of equity will interfere to protect and enforce it by injunction and bill in the nature of specific performance, as between the immediate parties and sub-purchasers with notice.

2. *Easement created and reserved by deed; whether personal only, or appurtenant to estate.*—An easement, or servitude, created by deed, is never presumed to be personal, or in gross, when it can be fairly construed to be appurtenant to some other estate; and when the reservation naturally operates to enhance the value of the other adjacent lands of the grantor, it is a strong circumstance to indicate that it was intended to be appurtenant to the estate, and not merely personal to the grantor.

3. *Same; case at bar.*—In this case, the owner of certain lands fronting on the river, on which he had a ware-house and landing, conveyed a part of them by deed to a steam-mill company as a site for their mill, expressly reserving to himself, his heirs and assigns, the right to erect and have a warehouse and landing on any part of the premises, and prohibiting such erection or use by the grantees, their heirs or assigns; held, that the easement was not personal to the grantor only, but was appurtenant to the lands, passed to a subsequent purchaser, and might be enforced by him against a sub-purchaser of the granted premises with notice.

4. *Same; condition of forfeiture and reversion.*—A stipulation in such deed providing for a forfeiture and reversion of the granted premises, on breach of the condition, is not assignable, but is only available to the grantor or his heirs; and it does not take away the jurisdiction of equity to protect and enforce the easement at the suit of an assignee or purchaser of the dominant estate.

APPEAL from the Chancery Court of Sumter.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed on the 20th December, 1883, by David H. Williams, against A. W. McMahon and John Rogers; and sought, principally, to enjoin the erection and use by the defendants of a ware-house and landing on certain premises owned and occupied by them, and to establish the complainant in the exclusive right to such ware-house and landing privileges. The premises owned by each of the parties, which fronted on the river in the town of Gainesville, belonged in 1836 to Moses Lewis; and the part owned and occupied by the defendants was conveyed by him, in February, 1836, to David M. Russell and others, engaged in business as partners



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under the name of the Gainesville Steam-Mill Company, from whom the defendants derived title by mesne conveyances. The complainant was the owner of the adjacent lands which had belonged to said Lewis at that time, claiming as a sub-purchaser; and the claim asserted by his bill was founded on certain reservations and stipulations contained in the conveyance by said Lewis to the Steam-Mill Company. The defendants filed a demurrer to the bill, which the chancellor overruled; and his decree is now assigned as error. The material stipulations of the deed are stated in the opinion of the court.

L. B. GODFREY, J. B. HEAD, and GUNTER & BLAKEY, for the appellants, cited *Badger v. Boardman*, 16 Gray, 559; *Woodruff v. Water Power Co.*, 2 Stockt. (N. J.) Ch. 502; *Underhill v. Railroad Co.*, 20 Barb. 455; *Blanchard v. Railroad Co.*, 18 Amer. Rep. 142; 10 East, 295; 2 Co. 70; 6 Barb. 386; 2 Bla. Com. 155; 2 Dutcher, N. J. 1; 3 *Ib.* 376; 12 Ired. 194; 3 Jones, N. C. 12; 19 N. Y. 100.

T. B. WETMORE, and A. G. SMITH, *contra*, cited *Robbins v. Webb*, 68 Ala. 393; and *Webb v. Robbins*, 77 Ala. 176.

SOMERVILLE, J.—The bill is one in the nature of specific performance, filed for the establishment and enforcement of an easement alleged to have been created in certain premises owned by the defendant McMahon, and leased by him to the defendant Rogers, who is sought to be enjoined from the use of the same in carrying on a general ware-house business.

In the year 1836, and prior thereto, one Moses Lewis was the owner in fee of a parcel of land in the town of Gainesville, Alabama, on the Tombigbee river. In February of that year, he conveyed a portion of this land, described in the bill and known as the "Steam-Mill site," to an association of persons calling themselves the "Steam-Mill Company," subject, as the deed recites, to certain "limitations, reservations, and restrictions." The grantees, their heirs and assigns, were expressly prohibited from opening across said premises any public river landing, or having or erecting thereon a public ware-house; but this right was reserved to the grantor, his heirs and assigns, to be exercised in such manner as not to materially interfere with the mill-business of the original grantees, or their assigns.

The complainant claims as purchaser, through various mesne conveyances, from Moses Lewis, alleging his ownership in fee of all of the ware-house lots and ware-house privileges of said Lewis. The defendants are alleged to have derived their title to the steam-mill site from the Steam-Mill Company, to whom Lewis sold in 1836.

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It is most obvious that, as between Moses Lewis, the original vendor, and his immediate vendees, the Steam-Mill Company, there was created, by express reservation, an easement in the granted premises, the nature of which is unmistakable. The vendees, their heirs and assigns, were excluded from the privilege of carrying on the ware-house business, and the grantor reserved this right for the benefit of himself, his heirs and assigns. An easement may consist, either in suffering something to be done, or in abstaining from doing something upon the servient tenement.—4 Kent Com. 419. Here, we have an illustration of both phases of it. In the civil law it is denominated a servitude, and its existence involves the idea of two distinct tenements,—a dominant estate, to which the right is accessorial, and a servient estate, upon which it is a burden or charge. A common form of such an easement or servitude, as in the present case, is the prohibition of a grantee or lessee from carrying on a particular kind of business or occupation on the servient estate, which, if unobjectionable on grounds of public policy, a court of equity will intervene to establish and protect by asserting a jurisdiction in the nature of specific performance.—*Robbins v. Webb*, 68 Ala. 293; *Webb v. Robbins*, 77 Ala. 176; *Trustees v. Lynch*, 70 N. Y. 440; s. c., 26 Amer. Rep. 615; Law Real Prop. (Boone), § 148; *Barrow v. Richards*, 8 Paige, 360.

The effect of the deed was to qualify the nature of the estate granted by Moses Lewis to the Steam-Mill Company; and by the acceptance of this deed, they became bound by all the reservations and limitations contained in the instrument, as fully and as effectually as if they had actually signed it. The grantees, in other words, took the fee expressly burdened with a servitude.—*Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; s. c., 13 Amer. Rep. 556; *Newell v. Hill*, 2 Metc. 180; *Winthrop v. Fairbanks*, 41 Me. 307.

The defendants, having notice of this servitude, acquired no better title than that of the original vendees, their assignors. "All agree," says ALLEN, J., in *Trustees v. Lynch* (70 N. Y. 440; s. c., 26 Amer. Rep. 615), "that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which would be enforced in equity against him, takes the title subject to all easements, equities and charges, however created, of which he has notice." To a like effect is the language used by Lord COTTENHAM in *Falk v. Moxhay*, 2 Phil. Ch. 774: "If an equity is attached to property by the owner, no one purchasing, with notice of that equity, can stand in a different situation from the party from whom he purchased."—*Webb v. Robbins*, 77 Ala. 176.

It is contended, however, that the present easement or servi-

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tude was intended solely for the personal benefit of the original grantor, Lewis, and not for the protection of his estate, or for the benefit of his successors in title—his heirs or assigns—and that it expired with his natural life. There are easements of this character, which are commonly said to be *in gross*—that is, attached to the person of the one using or claiming them, and not appurtenant to any estate; and the two kinds are often difficult to be distinguished. There are certain general rules on the subject, however, which are well settled, and serve as satisfactory guides in most cases. Whether, in the first instance, such a grant or reservation in a deed confers a personal right merely, or one appurtenant to the premises, must be ascertained from the terms of the deed itself, if it speaks any thing to the point; or, if not, by the situation of the contracting parties and the surrounding circumstances.—*Dennis v. Wilson*, 107 Mass. 591; Law of Real Prop. (Boone), § 136; *Peck v. Conway*, 119 Mass. 546.

A rule of controlling importance, especially in doubtful cases, is, that such an easement is never presumed to be personal, or in gross, when it can fairly be construed to be appurtenant to some other estate.—Washburn on Easements, 40, 232; *Spensley v. Valentine*, 34 Wisc. 154; *Dennis v. Wilson*, *supra*.

One of the most practical tests, supported by common sense and common business experience, is, whether the restriction imposed by the grantor or proprietor upon the granted premises would naturally operate to enhance the value of his adjacent premises, whether retained by him or conveyed to another. If this be so, it is a strong circumstance to indicate that the restriction was not intended for the mere personal benefit of the grantor, but as a permanent servitude beneficial to the owner of the land, whoever he may be, and appendant to the premises.—*Parker v. Nightingale*, 6 Allen, 341. The reported cases are numerous, and almost infinite in their phases of variety, where tracts of land in cities are sub-divided into lots, and sold to separate purchasers, subject to restrictions as to the kind of occupations which may or may not be carried on upon them, and even as to the nature and dimensions of the buildings to be erected on the premises. The inquiry, in these cases, has generally been, whether the servitudes or restrictions imposed were of such a nature as to operate as an inducement to purchasers; and, if so, the inclination of the courts has been to construe them as appurtenant to the estate, and intended for its protection, rather than personal to the grantor. If appurtenant, it of course follows the land, being assignable with it, and each grantee can enforce it in equity against each other grantee having notice of it.—*Sharp v. Ropes*, 110 Mass. 381;



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*Trustees v. Lynch*, 26 Amer. Rep. 615, *supra*; *Barrow v. Richards*, 8 Paige, 351; *Whitney v. Union R. Co.*, 11 Gray, 359; *Winthrop v. Fairbanks*, 41 Me. 307.

The application of these principles necessarily leads to the conclusion, that the present restriction against carrying on a public ware-house on the premises granted to the Steam-Mill Company, was intended by the contracting parties to be appurtenant to the adjacent land of the grantor, to protect the proprietor for all time to come, against competition in the ware-house business. The land of the grantor, being situated on a river bank in a town, was valuable chiefly because available for this particular branch of business. The imposition of the servitude on the grantee of a part of this land, was necessary to preserve its value in this particular. That it was greatly beneficial to the adjacent and remaining portion of the tract, retained by the grantor, is not even a subject of doubt. The terms of the deed, moreover, speak to the point by declaring, not only that the right to carry on the ware-house business is prohibited to the grantees and their heirs and assigns, but that it is reserved for the benefit of the heirs and *assigns* of the grantor, as well as for the grantor himself. These considerations are, to our mind, conclusive of the fact, that the servitude in question was intended to be permanent and appurtenant to the estate of the grantor, and not for his personal and temporary protection.

We may add that the case of *Badger v. Boardman*, 16 Gray, 559, cited and relied on by appellant's counsel, seems to militate against the foregoing views to some extent; but that case is explained, if not qualified, in the later one of *Parker v. Nightingale*, 6 Allen, 341, by the observation, that so far from there being anything in the deed to show that the restriction discussed in *Badger v. Boardman*, was designed for the benefit of the owner of the estate who sought to enforce it, "there was reason to believe that the restriction was inserted in the deed with the view to confer a privilege or easement exclusively upon another adjoining estate belonging to the grantor."

The jurisdiction of a court of equity, in this case, is not affected, in our opinion, by the clause inserted in the deed, by way of condition subsequent, providing that in the event of a violation of the rights of the grantor as secured by the servitude imposed on the granted premises, there should be a forfeiture or reversion of the estate. A breach of this condition could be taken advantage of only by the grantor and his heirs, and was not assignable with the estate. It did not, therefore, pass to the complainant, and it affords him no remedy for any existing rights he may have.—*Cross v. Carson*, 44 Amer. Dec.

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742; NOTE, p. 758; *Kennedy v. McCartney*, 4 Port. 141. Restrictions of this nature, creating easements or imposing servitudes, are often enforceable in equity, whether they are inserted by way of condition, covenant, or otherwise.—*Whitney v. Union Railway Co.*, 11 Gray, 359. There is no effort here, as in the case of *Blanchard v. Detroit Railroad Co.*, 18 Amer. Rep. 142, to specifically enforce as a covenant a contract which should be more properly construed to be a condition subsequent. The bill seeks only injunctive relief against the invasion of an equitable right fastened by reservation upon the estate granted to the defendants, and which they accepted subject to the servitude created thereby, and with full notice of it.

The decree of the court is free from error, and should, in our opinion, be affirmed.

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### *Action on Seaman's Advance Note, and for Money Had and Received.*

1. *Nonsuit; what is revisable.*—When a nonsuit is taken on account of adverse rulings on evidence, only those rulings, being duly excepted to (Code, § 3112), are revisable on error, and rulings on demurrer can not be considered.

2. *When action lies for money had and received.*—An action lies for money had and received, whenever the defendant has in his hands money belonging of right to the plaintiff, and privity of contract is not necessary to support it.

3. *Act of Congress (U. S. Rev. Stat., §§ 4532, 4534) regulating transfer of seamen's advance notes.*—The provisions of the act of Congress of June 7th, 1872, regulating the transfer of notes given for seamen's wages in advance (U. S. Rev. Stat., §§ 4532, 4534), have no application to seamen employed in foreign vessels.

4. *Estoppel against denying execution of note.*—When money is placed in the hands of a person to pay a note or draft at maturity, and he refuses to pay on demand by the holder, proof of the execution of the note is not necessary in an action against him, since he is estopped from denying its execution.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. WM. E. CLARKE.

L. H. FAITH, for the appellant, cited *U. S. v. Kellum*, 19 Blatch. 372; *U. S. v. French*, 14 Phil. (Penn.) 497; 16 Fed. Rep. 657; 20 Fed. Rep. 520; 1 Brick. Dig. 140, §§ 72-3.

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DESHON & LAY, *contra*, cited Rev. Stat. U. S., §§ 4532-34.

CLOPTON, J.—The complaint, as amended, contained a special count, and the common count for money had and received. A demurrer was interposed to the special count, which was sustained. The parties proceeded to trial on the common count, and, in consequence of adverse rulings on the exclusion of evidence, the plaintiff suffered a non-suit, taking a bill of exceptions. In this condition of the record, our inquiry is restricted to the questions presented by the exclusion of evidence. In such case, the ruling on the demurrer to the complaint is not the proper subject of an assignment of error, and can not be considered.—*Rogers v. Jones*, 51 Ala. 353.

The claim of the plaintiff is founded on his title to four "seamen's advance notes," as they are denominated, which were given by the master of a Norwegian barque to seamen who had shipped on the vessel. The plaintiff having proved that the master had deposited with Chamberlain & Co., of which firm the defendant is the surviving partner, sufficient money with which to pay the notes, offered to prove that, ten days after the barque sailed from the port of Mobile, he presented the notes to Chamberlain & Co. for payment, which was refused; stating to the court, at the time of the offer, that he expected to prove that the firm knew the notes had been given by the master for the advance wages of the seamen. The plaintiff subsequently offered the notes in evidence, in connection with proof that he had purchased them from the seamen, paying the face value, and that each note was indorsed by the seaman to whom it was payable. The evidence was excluded, in each instance, on objection by the defendant, and exception duly reserved.

An action for money had and received is appropriate, whenever the defendant has money in his possession, which belongs of right to the plaintiff. Privity of contract is not necessary to support the count. Chamberlain & Co. having received money for the purpose of paying the notes, when payable, the law implies a promise to pay it to the person entitled to receive it,—to the plaintiff, if the rightful holder of the notes.—*Plan. & Mer. Ins. Co. v. Tunstal*, 72 Ala. 142.

It is insisted that the notes were not discounted, or indorsed, so as to transfer the title to the plaintiff. The contention is based on the requirements of sections 4532 and 4534 of the Revised Statutes of the United States; that no advance wages, or advance security, shall be given to any seaman, except in the presence of the shipping commissioner; and whenever any advance security is discounted, such seaman shall sign, or set his mark to a receipt, indorsed on the security, stating the sum



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actually paid, or accounted for to him, by the person discounting the same. These sections constitute parts of an original act, passed June 7, 1872, entitled, "An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen."

By the terms of the title, and of several of the sections of the act, its provisions are limited to seamen engaged in merchant ships belonging to the United States. However broad may be the language of separate sections, when all are construed together, it is apparent that the act was not intended to regulate the engagements of seamen employed on foreign vessels. *United States v. Kellum*, 19 Blatch. 372. The evidence offered is admissible, to show that the plaintiff acquired the notes by purchase and indorsement, and was, *ex æquo et bono*, entitled to the money in the possession of the defendant, who had refused to pay it on presentation of the notes and demand. It is true, there was no offer to prove execution by the master of the notes; but, if the defendant received money to pay them, knowing they had been given, no further proof of execution is necessary. He is estopped to deny their execution.

Reversed and remanded.

## Waugh v. Emerson.

### *Action for Wages under Contract for Work and Labor.*

1. *Contracts of infants.*—A minor nineteen years of age, whose father is dead, whose mother is married again, and who has no guardian, may lawfully contract to perform personal services for another, and may receive partial payment in money and goods during the term of service, thereby discharging his employer to that extent, without regard to the strict rule limiting the liability of an infant for necessities.

APPEAL from the City Court of Selma.

Tried before the HON. JONA. HARALSON.

This action was brought by Walker Emerson, a minor suing by his next friend, against Emeline Waugh, to recover wages due for personal services rendered by him for defendant, in and about the cultivation of a crop and other work during the year 1885; and was commenced by attachment, sued out on the 29th October, 1885. The defendant pleaded *non assumpsit*, and payment before suit brought; and the cause was tried

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on issue joined on these pleas. On the trial, as appears from the bill of exceptions, it was shown that the plaintiff was about nineteen years old, that his father was dead, and that he was living, at the time of his contract to work for defendant, with his mother and her second husband. As to the terms of the contract, the plaintiff himself testified: "She told me she would give me \$10 per month, for each month I stayed there; that if I stayed, and made a crop, she would give me \$120, and would give me \$125 if I did well; that she would furnish me my washing, ironing and board free, and charge for no lost time." He testified, also, that he continued in the defendant's employment, in the faithful discharge of his duties, until he was discharged by her without cause. The defendant thus testified: "About the first of January, plaintiff came to me, and said my work begun 1st January, and wanted to know if I would pay him \$120 for a year's work. I told him, if he made a good and faithful hand, I would pay him that sum. He promised to repair houses, put sills under where necessary, split rails, clear up ground, pick cotton, and work faithfully all the time; but he never worked a single Saturday, nor picked any cotton, nor pulled any fodder, nor gathered any corn." She further testified, that she had advanced to him during the year, from time to time, on request, money, tobacco, articles of clothing, &c., of which she kept an account; and she produced this account, the items aggregating \$75.60. There was other evidence in the case, but it is not material to the question here decided.

The defendant requested the following (with other) charges to the jury. (3.) "In determining the necessities furnished the plaintiff by the defendant, the jury may include any and all sums of money which the defendant paid or furnished to the plaintiff in good faith; and the plaintiff must show that these sums were not paid or given to him for the purpose of buying or providing necessities for himself, before he would be entitled to have them disregarded in estimating how much of necessary articles was furnished to him by the defendant." (5.) "If the jury believe, from the evidence, that the plaintiff is a minor, eighteen or nineteen years of age, and that his father has been dead for several years; then it was his right and duty to work at some legitimate calling or labor, for his support and maintenance, and it was lawful and right for the defendant to hire him; and if she did hire him, and he performed work or labor for her, then it was lawful and right for her to pay him for such work; and if she did then, in good faith, pay him any sum or sums for his labor, then he can not recover in this suit the value of the services or labor thus paid for." The court refused each of these charges, and the de-

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fendant duly excepted to their refusal; and she now assigns their refusal, with other matters, as error.

S. W. JOHN, for the appellant.

BROOKS & ROY, *contra*.

STONE, C. J.—Walker Emerson, the plaintiff in this suit, was without a father, the latter having died several years before. His mother had contracted a second marriage, and was the wife of another. Walker was about nineteen years old, and had no guardian. He is not shown to have had any estate. Commencing in the latter part of 1884, or with the year 1885—(the testimony is somewhat in conflict on this point)—he agreed to serve Mrs. Waugh at an agreed price, either by the month, or for the year's work. He was to perform farm labor, but the parties disagree as to the kind of labor he was to perform. In fact, the testimony is in conflict on every disputable question of fact in the cause. In October the plaintiff finally left Mrs. Waugh's service. Mrs. Waugh claims that, during the continuance of the service, she made to the plaintiff many partial payments of his wages in money and merchandise, and that he lost much time from his work, for which she claims a ratable discount from his agreed compensation. Emerson in his testimony denies the extent of Mrs. Waugh's claims of payment and discount. These were the main issues of fact before the jury.

For the plaintiff—appellee here—it was contended in the court below, and the contention is renewed here, that the doctrine of an infant's liabilities for necessary articles furnished him, must be applied to Mrs. Waugh's asserted partial payments made; and that unless such payments and furnishings were in fact necessities, suitable to his estate and condition in life, then Mrs. Waugh is not entitled to a credit for them. We can not assent to this. The contract to serve was made by Emerson; and though a minor in years, he was in fact and in law emancipated. No one was bound to support him, and no one but himself could claim his wages. He had a clear right to direct and appoint their payment, and no other person could interpose and assert a paramount right to them. The present suit, brought while he was yet a minor, is itself an assertion of his right to collect them. His guardian *ad litem* would have no right to control the recovery. Will it be contended that the judgment he might recover could not be collected until a legal guardian is appointed to receive it? and if paid to him, or to his guardian *ad litem*, when the collection is coerced by execution, will the defendant be liable to another



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recovery, when a legally appointed guardian comes to claim it? *Donegan v. Davis*, 66 Ala. 362; *Glass v. Glass*, 76 Ala. 368; *Nightingale v. Withington*, 15 Mass. 272; *Whiting v. Earle*, 3 Pick. 501; *Johnson v. Silsbee*, 49 N. H. 443; *Isaacs v. Boyd*, 5 Por. 388; *Ware v. Cartledge*, 24 Ala. 622; *Clark v. Goddard*, 39 Ala. 164; *Engelhardt v. Yung*, 76 Ala. 534.

Situated as the defendant was, with no one but himself entitled to his earnings, he was entitled to receive compensation for his services, and equally entitled with an adult to receive partial payment while the work progressed. Payments to an infant should, probably, be scrutinized more narrowly, that frauds upon him, either in price or quality, be not sanctioned by the court. Beyond this, and with the exception of overreaching bargains, the right of an emancipated minor to receive compensation for labor performed by him pursuant to his own contract, express or implied, rests on the same principle as that of an adult. The fifth charge asked and refused should have been given. We need not notice the other questions raised.

Reversed and remanded.

## Georgia Pacific Railroad Co. v. Fullerton.

### *Action against Railroad Company, for Injuries to Stock.*

1. *Statutory provisions as to liability of railroad company for injuries to cattle.*—Sections 1704–09 of the Code of 1876, as to the liability of railroad corporations for damages on account of live-stock killed or injured, have been superseded and repealed by the later statute now embraced in sections 170–15.

2. *Measure of damages against railroad company, for injuries to cattle.* The measure of the plaintiff's damages, in an action against a railroad company on account of cattle killed, is not necessarily the value of the animal when alive, but the difference in value between the living animal and the dead carcass; and though he may abandon the carcass, when comparatively worthless, and recover the full value of the living animal, yet, if he converts it to his own use, or otherwise disposes of it, or if he might realize appreciable value for it by the exercise of reasonable diligence, the net amount of such value must be deducted.

3. *Same; interest.*—The plaintiff should be allowed interest on the amount of his damages, not from the commencement of his action, but from the time the injury was done.

APPEAL from the Circuit Court of Fayette.

Tried before the Hon. S. H. SPOTT.

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This action was brought by John M. Fullerton against the appellant, a corporation doing business in this State, to recover damages for the loss of a cow, which was alleged to have been killed by the negligence of the defendant's servants; and was commenced in a justice's court, on the 24th January, 1885. In the Circuit Court, on appeal, a trial was had on issue joined on the pleas of not guilty, set-off, and recoupment. The bill of exceptions purports to set out "substantially all the evidence" in the case. "The plaintiff's evidence tended to show that the cow, which was his property, was killed by the defendant's railway train, on the 27th September, 1884, at or near the place mentioned in the complaint; and that the animal was worth \$21. It was shown, on cross-examination of plaintiff's witnesses, that the animal was a young cow, about four years old, fat and in good condition, suitable for beef, and as beef worth in the market at that time \$21; that plaintiff resided only a short distance from the place of the accident, and was informed of it the same evening, within two or three hours after it occurred; that he had the animal skinned, the hide being worth in the market one dollar, but did not make use of the carcass of the animal in any way." One Crowley was afterwards examined as a witness for the plaintiff, "whose testimony tended to show that he was, at the time of the accident, within a short distance of the place where the cow was knocked from the track by the defendant's train of cars on one Saturday evening; that when he saw the cow, both of her hind legs were broken; that he afterwards went to the plaintiff's house, about one mile distant, and found him at home sick, and unable to leave the house, when informed of his cow being crippled; that defendant's agents, on the Monday following, had the cow knocked in the head and killed, and that she was not at that time fit for beef."

It was proved, also, that the accident occurred on a curve in the defendant's road, in a cut where the embankment on each side was about five feet high. The engineer of the train, who was examined as a witness for the defendant, testified that the train was running, at the time of the accident, at the rate of fifteen miles per hour, on a down grade; that the cow, when he first discovered her, was not more than twenty-five or thirty yards ahead of the engine, and was attempting to climb the embankment, but fell back across the track, before he could stop the train, or do more than sound the cattle-alarm, which he did. He testified, also, "that the track of the road, at the place of the accident, was not open to view in a straight line for more than one hundred yards, owing to the undergrowth, curve and embankment;" and that it was impossible to avoid the accident, or to stop the train, after he first saw the cow,

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“as he could not stop the train, on a grade like that, within less than one hundred and fifty or two hundred yards.” A witness for the plaintiff testified, on the other hand, “that there was an open view on the track for two hundred, or two hundred and fifty yards, from the point where the cow was struck, in the direction from which the train approached; and that an object might have been seen by the engineer at that distance, if he had been keeping a close look-out.” Several witnesses for the plaintiff testified, also, that they saw tracks on the road at the place of the accident, tending to show that the cow had been running on the track of the road for fifty yards before she was struck.

The defendant asked the following charges to the jury: (1.) “If the jury believe the evidence, they must find for the defendant.” (2.) “If the jury believe, from the evidence, that the animal killed was a young cow, fat and in good condition, and worth \$21 as beef; and that the plaintiff was informed of the accident on the same evening, and could by reasonable diligence have dressed and used the animal for beef, but neglected and failed to do so; then the value of the animal as beef should be allowed as a set-off, or in recoupment of damages.” (3.) “If the jury believe, from the evidence, that the animal killed was worth \$21 as beef, and was plaintiff’s property after it was killed; and that it could have been sold for that sum, and was worth that (or any other) sum to him; or that he could have made such reasonable use or disposition of the animal as would have proportionately diminished the damages,—then the amount she was so worth as beef must be deducted from her value as a milch cow or otherwise.” The court refused each of these charges as asked, and the defendant excepted to the refusal of each.

The court instructed the jury, among other things, “that if they should find in favor of the plaintiff, the measure of his damages would be the value of the cow at the time of the killing, and their verdict should be for that amount, with interest from that time up to the present.” To this charge, also, the defendant excepted.

The charge given, and the refusal of the charges asked, are now assigned as error.

MCGUIRE & COLLIER, for the appellant.—The plaintiff was only entitled to compensation to the extent of the injury which he had received; and in estimating his injury, the value of the hide, and also the value of the carcass as beef, though it may have been lost by his own negligence, should be deducted from the value of the living animal.—Thompson on Negligence, 539; *R. & D. Railroad Co. v. Roberts*, 88 N. C. 56; *Railroad*



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*Co. v. Finnegan*, 21 Ill. 646; *Burton v. Railroad Co.*, 84 N. C. 102; *Jackson v. Railroad Co.*, 74 Mo. 526; *Dean v. Railroad Co.*, 43 Wis. 305; 13 Amer. & Eng. Railway Cases, 564; 20 *Ib.* 473. It is submitted, also, that there was no material discrepancy in the testimony, and the general charge asked should have been given.

NESMITH & SANFORD, *contra*.—(1.) The first charge asked was properly refused.—*King v. Pope*, 28 Ala. 600; *Skains & Lewis v. State*, 21 Ala. 218; *Edgar v. McArn*, 22 Ala. 796; 1 Brick. Digest, 344, § 135. (2.) The proper measure of damages, under the statute, is the full value of the property destroyed by the negligence, or other unlawful act of the defendant's servants.—Code, § 1700. No deduction can be claimed in this case, even if the rule be otherwise, because it is shown that, at the time of the injury, the plaintiff was unable, from sickness, to do any thing with the carcass.

SOMERVILLE, J.—The point most pressed on us in this case relates to the proper measure of damages where live stock or cattle belonging to the plaintiff has been negligently killed by the locomotive or cars of a defendant railroad company. There would be no room for argument about the matter, if section 1704, of the Code of 1876, was unrepealed and still in force; for the measure of damages there declared is the value of the stock if killed, and the damage thereto if injured. But sections 1704 to 1709 of the Code appear to have been superseded and repealed by the act of February 3, 1877, now embodied in sections 1710 to 1715 of the same Code.—*Zeigler v. S. & N. Railroad Co.*, 58 Ala. 594; *S. & N. Ala. Railroad Co. v. Morris*, 65 Ala. 193. The repeal of section 1704 leaves the question of damages to be governed by section 1700, which declares, that “a railroad company is liable for all damages done to persons, stock, or other property,” resulting from a failure to comply with the statute, or from any other negligence on the part of the road or its agents. The value of the stock killed is nowhere else declared to be the absolute criterion of the plaintiff's damages, but may be looked to for the purpose of determining the jurisdiction of the court assuming to take cognizance of the subject-matter.—Code, 1876, §§ 1711, 1714. On the contrary, the thing intended to be proved upon the trial is elsewhere reiterated to be “the damage or injury to such stock or cattle.”—Code, § 1712.

If the stock or cattle be killed, it does not follow that, in every case, the necessary measure of the plaintiff's recovery must be the value of such stock. Such value is undoubtedly the *prima facie* measure of damages, and the burden of proof

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may be thrown on the defendant to overcome this presumption, when once it is made to arise upon proved facts. But, upon every sound principle, the damage suffered by the plaintiff is the difference in value between the cattle when alive, and the carcass of the animal when dead.—*Illinois Cent. R. R. Co. v. Finnegan*, 21 Ill. 646. The dead animal unquestionably belongs to the plaintiff, and not to the railroad company, by whose negligence it was killed. The tort committed does not operate to divest the title of the property, so as to transfer it to the wrong-doer. If the carcass, being of any pecuniary value, should be converted to the use of the railroad, an action of trover would lie for it in favor of the owner. The carcass, it may be, is most frequently worth nothing to the owner; and the facts must be peculiar which would overcome this presumption. It is often bruised and mangled, and unfit for any use. Its small value, and distance from any available point, may render its utilization profitless. There may be no ready market for it, even if possessing some value. In such and like cases, we apprehend, the owner may abandon the carcass, and claim the reasonable value of the animal before it was killed, as the proper measure of his compensation.—Thompson on Negligence, p. 539, § 31; *Rockford R. R. Co. v. Lynch*, 67 Ill. 149; 3 Wood's Railway Law, p. 1549, § 423.

But, where the owner assumes dominion over the property, after it is killed, and converts it to his own use, or gives it away to another, its net value, if anything appreciable, must be deducted in estimating the plaintiff's damages.—*Case v. St. Louis R. R. Co.*, 75 Mo. 668; s. c., 13 Amer. & Eng. R. R. Cases, 546. So, where it is made to appear by the defendant that the carcass of the dead animal is valuable for beef, or other purposes, and could have been disposed of by the plaintiff by the exercise of reasonable diligence—by which we mean such diligence as would or should have been exercised by a person of ordinary prudence, who was situated in like circumstances with the plaintiff—then the plaintiff can not wantonly abandon the carcass, and, by refusing to perform his clear duty in the premises, aggravate the amount of his recovery. It is the duty of one injured by the act of another, to use all reasonable and convenient care to diminish the amount of his own pecuniary damage.—1 Sedgw. on Dam. (7th Ed.) pp. 56, 166, n. The case of *Illinois Cent. R. R. Co. v. Finnegan*, 21 Ill. 646, cited by the appellant's counsel, is a strong and direct authority in support of this view, as applicable to a case like the present. The same principle is announced in *Roberts v. Richmond & Danville R. R. Co.*, 88 N. C. 560 (s. c., 20 Amer. & Eng. R. R. Cas. 473), where the action was for killing cattle. The court said: "The cow, as the plaintiff testified, was worth from

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eighteen to twenty dollars for beef, and was his property still. If she could have been sold for that sum, or was worth it to the owner, he should have made such reasonable use or disposition of the cow as would have proportionally diminished the damages." There are several rulings in Indiana, holding the value of the animal killed to be the absolute measure of the owner's damages, but they are based upon a statute expressly declaring such a rule.—*Ohio & Miss. R. R. Co. v. Hays*, 35 Ind. 173. The doctrine which we have stated above is believed to be better sustained by reason and authority.—3 Wood's Railway Law, p. 1569, § 423.

In estimating, in a proper case, what amount should be deducted for the value of the carcass, in order to correctly assess the plaintiff's damages, it is obvious that such deduction should be for the net, and not for the gross value of the carcass, where it has any such value. This net value is the actual benefit derived, or what was or might have probably been realized from its sale or use, after making reasonable allowance for the expense or time and trouble required in effecting a sale.—*Dean v. Chicago & N. Railway Co.*, 43 Wis. 305.

This deduction is made, not strictly as a set-off, or by way of recoupment to the plaintiff's claim; but it is a restriction entering into the rule of law, by which the jury are to be governed in their calculation or assessment of the damages suffered by the plaintiff.

When a recovery is had in cases of this nature, the jury should allow interest on the amount ascertained to be due the plaintiff, from the date of the loss or killing to the time of trial, and not merely from the commencement of the action, as held in some of the States.—*Ala. Gt. S. R. R. Co. v. McAlpine*, 75 Ala. 113.

The rulings of the court were opposed to these views, and were erroneous.

There was sufficient conflict in the evidence, in our judgment, to authorize a refusal by the court to give the general charge requested by the plaintiff.

The judgment is reversed, and the cause remanded.



## James v. Conecuh County.

### *Action by County on Bond of Bridge Contractor.*

1. *When action lies; information or complaint of freeholder.*—When a bridge has been erected under contract with the county commissioners, and bond taken from the builder conditioned to keep it in good repair for five years (Code, §§ 1692-93), that court may notify and require the builder to repair it, and, in the event of his refusal or neglect to do so, maintain an action on the bond, in the name of the county, without previous information or complaint by a freeholder of the county.

2. *Measure of damages, in action on statutory bond of bridge contractor.* In an action brought in the name of the county, on the statutory bond given by a bridge contractor (Code, §§ 1692-93), the measure of damages would be the reasonable cost of making the repairs necessary to insure the safe condition of the bridge during the period covered by the bond; and if the county has already made the repairs, on default of the contractor after notice, the amount paid, though not conclusive, is a circumstance to be considered by the jury in estimating the value of the necessary repairs.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought in the name of Conecuh County, against C. S. James, S. E. James, and J. P. Howard; was commenced on the 14th May, 1884, and was founded on a penal bond executed by said defendants, payable to the plaintiff, which was dated February 23d, 1880, and conditioned as follows: "Whereas the said C. S. James did, on the 6th day of December, 1879, contract to build, and did build, for the use of Conecuh county, a bridge across Murder Creek, known as the Perryman bridge, which was received by the committee appointed for that purpose, for the sum of \$75; now, if the said C. S. James shall keep [said bridge] in good repair for the safe passage of travellers and others passing over said bridge, for five years from the date of its reception, which is February 18th, 1880, the above obligation to be void," etc. The complaint set out the bond in full, and alleged, as breaches of the condition: (1.) That said bridge, during the year 1883, became out of repair, and dangerous to the travelling public and others; that said C. S. James was duly notified, by the court of County Commissioners of said county, to repair said bridge, but failed to do so; to plaintiff's damage, \$150. (2.) That the timbers in said bridge were, during the year 1883, decayed to such an extent as to make it unsafe for travellers and others to pass

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over said bridge; that said C. S. James was duly notified by said court to repair said bridge, but failed to do so; and that said court had to expend a large sum of money to repair said bridge, and to employ counsel to bring this suit; to plaintiff's damage, \$150. The cause was tried on issue joined, but the record does not show what pleas were filed.

On the trial, as the bill of exceptions states, the plaintiff's evidence "tended to show that the bridge was built, and was received by the county, and was used as a public bridge until about September, 1883, at which time the Commissioners Court ordered notice served on said C. S. James as to its condition, and that suit would be brought on his bond, under the statute, unless he repaired and put said bridge in safe condition; which notice was given, and no point was raised as to the regularity of said order or said notice. The proof tended to show that the bridge was in an unsafe and dangerous condition, both before and after the giving of said notice; that said C. S. James afterwards made some temporary repairs, but did not put the bridge in good repair, and it was soon in an unsafe condition, and so remained until repaired by the judge of probate, under authority from the County Commissioners; that the amount expended by the county in making these repairs was \$85, and the bridge was then left in a very substantial condition, and would probably remain good for four or five years. As originally built, the bridge contained a span in the center about thirty feet in length, which, on account of its length, caused the bridge to shake when vehicles were passing over it; and this was one of the causes of complaint against the safety of the bridge. When the bridge was repaired, a new arch was erected under the center of this span; but the court instructed the jury, that they must not estimate any damages on account of putting in said arch—that it was not the duty of the defendant to put such arch in the bridge. P. D. Bowles, a witness in the case, while testifying as to the cost of the repairs and the condition of the bridge, was asked by the defendants, on cross-examination, these questions: 'What do you say would have been the smallest reasonable value necessary to have put the bridge in good repair, and kept it in that condition until the 18th February, 1885?' 'What would be the reasonable value necessary to have put the bridge in good repair, and kept it in that condition until the 18th February, 1885?' To each of these questions the plaintiff objected, and the court sustained the objections; to which rulings the defendants excepted. There was evidence showing the reasonable and necessary expense to put the bridge in good repair, and that it was out of repair a long time before the said notice was

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given to the said C. S. James." This was, substantially, all the evidence in the case.

"The defendants requested, among other charges in writing, the following: 'If the proof fails to show that the unsafe condition of the bridge was made known to the Commissioners Court by some freeholder of the county, then the plaintiff can not recover; for, unless this was done, said court had no right to make the order requiring notice to be given, and ordering suit to be brought on the bond.' The court refused this charge, and the defendants excepted to its refusal."

The several rulings to which exceptions were reserved, as above stated, are now assigned as error.

W. L. BRAGG, for the appellants.

STALLWORTH & BURNETT, *contra*.

CLOPTON, J.—The action is brought on a bond conditioned to keep a bridge, erected by contract with the County Commissioners, in good repair for the safe passage of travellers and others for a period of five years from February 18th, 1880. The defendants insist, that unless the unsafe condition of the bridge is made known to the court of County Commissioners by a freeholder of the county, as provided by section 1693 of the Code, that court is without authority to notify the contractor to repair it, and to order suit on the bond in case of his refusal or neglect to do so in a reasonable time; in other words, that such information by a freeholder is preliminary and requisite to the right of the county to maintain suit on the bond for a breach thereof.

Every county, established in this State, is a body corporate, with power to sue and be sued in any court of record. Code, § 815. It is true, the county is a political, or civil division of the State, created as a local governmental institution, for the benefit of the people within its territorial limits. The purposes of its corporate existence are public only; and it is clothed with corporate capacity to enable the more effectual accomplishment of these purposes. While the authority and duty to construct necessary bridges are governmental in their character, the means by which the power may be exercised, and the duty performed, may relate to the corporate character of the county. The County Commissioners are authorized to erect bridges by contract, and to take a guaranty, by bond or otherwise, that such bridges shall continue safe for the passage of travellers and other persons for a stipulated time. The power to erect is governmental; but the authority to make contracts, as the means and mode of erecting, is corporate.



[James v. Conecuh County.]

General power to sue, and special power to make contracts for specified purposes, confer authority and capacity, in the absence of statutory limitations or restrictions applicable generally, or to the particular case, to bring and maintain any appropriate action to recover damages for the breach of a contract, which the county is authorized to make; otherwise, it would be powerless to enforce its contracts. The County Commissioners, exercising the legislative and executive powers of the county, are authorized to order such suit to be brought, and to employ counsel for the purpose.—*Jack v. Moore*, 66 Ala. 184. The question results, does section 1693 impose upon the right and authority of the court of County Commissioners to order suit on the bond of a contractor to erect a bridge, as a limitation or restriction, antecedent information of its damaged condition by a freeholder of the county? When a bridge is erected by contract, and a guaranty taken, any person injured during the period covered by the guaranty may bring suit in his own name on the bond, and the county is exempt from suit and liability; but, after the expiration of the stipulated time, the county may be sued, and damages recovered, by any person sustaining injury by reason of the defective condition of the bridge.—Code, § 1692; *Barbour County v. Horn*, 41 Ala. 114. The purposes of the bond are two-fold—redress to any person injured during the stipulated period, and protection to the county, at its expiration, against the burden and expense of immediately repairing the bridge in order to avoid the statutory liability. The obligation is to keep the bridge in such repair that it shall *continue* safe for the passage of travellers and other persons during the stipulated time. The condition of the bond is broken, whenever the bridge is suffered to remain unsafe for an unreasonable time. There can be no rational implication, that it was intended by the statute to exempt the contractor from liability to suit, unless some person was damaged, or some freeholder of the county saw proper to make complaint to the court of County Commissioners. Upon the County Commissioners is devolved the duty to provide for keeping the necessary bridges in repair; and to enable them to perform this duty, when a bridge is erected by contract, and a guaranty taken, suit on the guaranty may become requisite. The duty is public, and involves the interests of all the people, whether or not freeholders. Unless so declared, expressly or by necessary implication, its performance should not, by construction, be made dependent upon the voluntary action of any member of any class of the people. Section 1693 provides for the case of a bridge washed away, or so damaged as to become unsafe to the public; and in such case, on the fact being made known by a freeholder of the county, the imperative duty of the

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court of County Commissioners arises, to notify the contractor, and, on his refusal or neglect to rebuild or repair in a reasonable time, as the case may be, to order suit on the bond. The statute is enabling in its nature and operation, clothing any freeholder of the county with power to demand the rebuilding or repair of the bridge, or the alternative, a suit on the bond. It was not designed, and does not limit or qualify the general right and authority of the county to sue on the bond, if there is a breach of its condition, and to recover such damages as the county may have sustained.

The measure of damages is the value of such repairs, as a complete performance of the condition of the bond may reasonably require—such amount as may be required to put the bridge in good repair, and to continue safe for the passage of travellers and other persons during the stipulated time; not measured with mathematical accuracy, but ascertained with reasonable certainty. The county may repair in the same manner substantially as the contractor was obligated to do, if he had undertaken to perform his contract. Two purposes are to be considered; the bridge must be put in good repair, and in a state to continue safe during the stipulated time. Whatever materials and work are essential to the accomplishment of both these purposes is authorized, though the consequence may be that the bridge will continue safe after the expiration of the agreed period. The amount which the repairs may cost the county is not the measure of damages, though it may be a circumstance properly considered by the jury in estimating the value of such repairs. The witness, Bowles, having been examined by the plaintiff as to the cost of the repairs and the condition of the bridge, it was permissible for the defendants to inquire of him, on *cross-examination*, the reasonable value of putting it in good repair, and of keeping it in that condition until the expiration of the contract time. For the error in excluding this question, the judgment must be reversed.

Reversed and remanded.

## Pratt Coal and Iron Co. v. Davis & Davis.

*Action against Railroad Company, for Injuries to Horse.*

1. *Duty of railroad company, as to condition of track and approaches thereto.*—A railroad company is required to keep its track and the approaches thereto, at public crossings, in good repair; but, with this ex-

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ception, the track is private property, and its use by private persons is governed by the same principles which apply to the property of private persons.

2. *Same; liability for injuries to horse at crossing.*—A railroad company is not liable for injuries to a horse caused by its foot being caught between a projecting spike and one of the iron rails of the track, at a private crossing erected by third persons, which is not shown to have ever been used or repaired by the railroad company, nor to have been serviceable to it in any way.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by Davis & Davis, suing as partners, against the appellant, a private corporation, owning and operating a railroad between its mines and the city of Birmingham, to recover damages for the loss of a horse, which was killed at a crossing on the defendant's track, just outside the corporate limits of Birmingham; and was commenced on the 25th May, 1885. There was a demurrer to the complaint, which was overruled; and a jury being waived, the cause was submitted to the court for decision. It was proved, as the bill of exceptions states, that the accident occurred in May, 1885, at a crossing on the defendant's railroad track, outside the limits of the city of Birmingham, while one of the plaintiffs was driving the horse in a buggy; that one foot of the horse was caught between the iron rail of the track and a projecting spike, which extended above the cross-tie, or timber in which it was driven, from an inch to an inch and a half, and was held so firmly that the horse was thrown forward, and received injuries from which it died in a few minutes. As to the place at which the accident occurred, it was shown that the defendant's road was, at that point, on an embankment about five feet high; and at the crossing, on each side, approaches to it had been thrown up from the ground. The dirt road had the appearance of being much travelled, and had been used between twelve and fifteen months. Two of the streets of Birmingham converged to the crossing, and again diverged beyond it. Several witnesses for the plaintiff testified, "that said crossing was put in like a public crossing, except that the planks were not as long or as thick as those used by railroads at public crossings; but there was no evidence introduced tending to show that either the county or the city had established a public crossing at that point." A witness for the defendant testified, that the crossing was put in by one Henry Harris; "and there was no evidence in conflict with this witness, as to this point." A witness for the defendant, who was the section-boss of the railroad at that point, "testified, that said crossing had never been recognized by the defendant as a public crossing, and he had never himself recognized it as such since he had been



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section-boss; that the defendant had never kept up said crossing, nor done any work on it as a crossing, since he had been on the road there. The roads leading to the crossing passed over private property; and no witness had ever seen the defendant, the county, or the city, working on said crossing, or on the roads leading thereto. The defendant's evidence tended to show, also, that said crossing, and the roads leading to it on each side, did not approach any of the defendant's depots, and that said crossing was not at all for the benefit of the defendant." On all the evidence adduced, the court rendered judgment for the plaintiff; and this judgment is now assigned as error, together with several rulings on evidence to which exceptions were reserved, but which require no special notice.

HEWITT, WALKER & PORTER, for the appellant.—There is no dispute, in this case, as to the extent of the duty of a railroad company to keep its track and the approaches thereto, at a public road crossing, in reasonably good and safe condition for passage by the public; and the record does not present any phase of that question. Here, the crossing was erected by a private person, for private convenience; no public road had had ever been established at that point; the defendant had not assumed any obligation as to the condition or use of the crossing, nor can any obligation be implied from its permissive use without objection.—*Missouri Railroad Co. v. Long*, 6 Amer. & Eng. R. R. Cases, 254; *Memphis & Charleston Railroad Co. v. Lyon*, 62 Ala. 74; 40 Amer. Rep. 664; Cooley on Torts, 606; *Sweeny v. Railroad Co.*, 10 Allen, 372; 7 Hurl. & Nor. 741; *Frost v. Railway Co.*, 10 Allen, 387; *Hargraves v. Deacon*, 25 Mich. 1; *Railroad Co. v. Bingham*, 29 Ohio, 364; *Severy v. Nickerson*, 120 Mass. 306; *Nicholson v. Erie Railway*, 41 N. Y. 525; 97 Eng. Com. Law, 731.

LANE & TALIAFERRO, *contra*. (No brief on file.)

STONE, C. J.—The sum of the facts in this case is, that the appellant corporation owns and operates a railroad from its works in the county, to the city of Birmingham. As it nears the corporate limits of the city, it runs on an embankment five feet high; and at this point the injury complained of was suffered. Crossing the track and adjacent lands at this place, there was no public highway, either by order of the court of County Commissioners, or by prescription or long usage. On either side of the track, the property was owned by private individuals. The railroad had been in operation about three years; and when located and constructed, there was no road, either public or private, at the place. About

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twelve or fifteen months before the injury, some person, not connected with the railroad, nor in its employ, constructed approaches by which to cross the railroad track, and had laid some planks; but they were thinner and shorter than such timbers usually are, when laid by railroads. After the approaches had been thus constructed, the crossing was frequently used by the public; but no repairs had been put upon it by the railroad company. There was no testimony that the crossing was of any service to the railroad company, nor was it shown whether the company had ever sanctioned or forbidden its use. The plaintiff, while attempting to cross the track at that place, had his horse's foot caught between a projecting spike and one of the rails of the track, and the horse was thereby thrown and killed. Whether, under these circumstances, the railroad company is liable for the injury, is the sole question in this cause.

It can not be denied, that railroad companies are required to keep the approaches to their track, and the track itself, at public crossings, in good repair.—*S. & N. Ala. R. R. Co. v. Mc-Lendon*, 63 Ala. 266. With this exception, however, the track is as much the private property of the railroad company, as is the freehold of a mere private citizen. It is no more a public highway, than is the uninclosed domain of the private landholder. No one, not travelling on the train, has a right to be upon it, at points other than the highway crossings, except by permission, express or implied.—*Tanner v. L. & N. R. R. Co.*, 60 Ala. 621. Applying this principle to this case, the railroad company owed no higher duty to the plaintiff, in reference to this crossing, than did the co-terminous land proprietors, over whose soil this pass-way—private pass-way—had been silently permitted to be used. Whoever avails himself of such tacit permission, accepts it as he finds it, with the limitation, that no man is permitted to set man-traps and pitfalls, as a means of annoying or injuring another.—*M. & E. R. R. Co. v. Thompson*, 77 Ala. 448; *Mo. R. R. Co. v. Long*, 6 Amer. & Eng. R. R. Cas. 254; *Cauley v. P. C. & St. L. Ry. Co.*, 40 Amer. Rep. 664; *Severy v. Nickerson*, 120 Mass. 306; *Hargraves v. Deacon*, 25 Mich. 1.

The plaintiffs showed no right of recovery, and the City Court erred in the judgment rendered.

Reversed and here rendered, giving judgment that defendant go hence without day, and recover costs in the court below, and in this court.

## **Westinghouse Machine Co. v. Wilkinson & Cole.**

### **Same v. Montgomery Iron Works Co.**

*Actions on Promissory Note, against Maker and Indorser.*

1. *Corporation for manufacturing machinery; can not act as agent to sell for another.*—A private corporation, organized, as declared in its charter, for the purpose of manufacturing and repairing machinery, and prohibited from contracting any debt without the written consent of its board of directors, has no power to act as the agent of another manufacturer in making sales of his machinery.

2. *Same; promissory note of purchaser.*—The corporation having no power to act as such agent in making sales, a promissory note taken by it from a purchaser, for the agreed price, payable to itself, is void; and the manufacturer can not maintain an action on it, either against the maker, or against the corporation as indorser.

FROM the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

These two actions were brought by the appellant, a private corporation chartered under the laws of Pennsylvania, and were commenced on the 21st September, 1885. The cause of action, in each case, was a promissory note for \$2,000, dated at Montgomery, May 9th, 1885, and payable four months after date, with interest from date; which was signed by Wilkinson & Cole, payable to the Montgomery Iron Works Company, at the First National Bank of Montgomery, and indorsed by said Montgomery Iron Works Company; said Wilkinson & Cole being sued as the makers, and the Montgomery Iron Works Company as the indorser. Wilkinson & Cole filed a special plea, alleging that the note sued on was null and void, because its only consideration was the agreed price of machinery sold to them by said Montgomery Iron Works Company as the general agent of the plaintiff, and said company had no authority under its charter to act as such agent, or to make such sale; and a demurrer to this plea having been overruled, issue was joined on it. In the other case, "the only defense set up by the said Montgomery Iron Works Company was, that the indorsement of said note was beyond the powers of said defendant corporation, and therefore the defendant was not liable." On the trial, as the bill of exceptions in each case shows, it was proved that the Montgomery Iron Works Company was organ-



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ized as a private corporation, under the general statutes of Alabama, in 1882, there being only four incorporators, who were also the only stockholders (except an infant child of one of them) and directors; and the charter of the corporation was read in evidence, which stated that the company was "organized for the purpose of manufacturing and repairing machinery, &c., in the city of Montgomery," and further provided "that no debt should be contracted on account of said company, without the written consent of the board of directors." It was proved, also, that this charter was duly recorded; "but there was no evidence that plaintiff ever knew, or had any notice except as implied from said record, as to what the contents of said charter were." It was proved, also, that in 1883, soon after it commenced business, said company, "with the knowledge and consent of all its directors and stockholders, entered into a written contract with plaintiff, by which it became plaintiff's agent for the sale of plaintiff's engines and machinery, and continued to act as such agent until September, 1885; that the conditions of such agency were, that plaintiff was to ship to said company engines, machinery, &c., at prices which plaintiff was to receive from said company, and said company had the right to sell said engines, machinery, &c., at any price it could obtain, only accounting to plaintiff for said agreed price at which the things were charged; that in pursuance of this agreement, machinery was shipped by plaintiff to said company, from time to time, until after the 9th May, 1885, plaintiff keeping a general account against said company, on which all machinery shipped to said company, or to others as directed by it, were charged at the price plaintiff was to receive, and all remittances by said company, were credited; and that the said company, with the full knowledge and consent of all its stockholders and directors, had printed on its letter-heads the statement that it was plaintiff's agent." It was proved, also, that the said company sold to Wilkinson & Cole, in the spring of 1884, two engines and other machinery, which had been shipped by plaintiff under the agreement above stated; that the price to be paid by Wilkinson & Cole was about \$3,000, part of which was paid prior to November, 1884, on which day they executed their note for the residue, payable May 9th, 1885, to the order of said company; and that the note sued on was afterwards given in extension of the balance due on this note. On this evidence, the court charged the jury, in each case, that they must find for the defendant, if they believed the evidence. The plaintiff excepted to this charge, and it is now assigned as error, together with the overruling of the demurrer to the special plea.

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WATTS &amp; SON, for the appellant.

ARRINGTON & GRAHAM, *contra*.

SOMERVILLE, J.—In May, 1885, Wilkinson & Cole executed a note for two thousand dollars, payable to the order of the Montgomery Iron-Works Company, which was indorsed by the payee to the plaintiff—the Westinghouse Machine Company—a body corporate, which here brings suit on this note respectively against the makers and the indorser. The two causes are submitted together, and, as they depend upon essentially the same principles of law, we consider them together.

The question presented is one of *ultra vires*, or of corporate power. The consideration of the note sued on was a balance due on certain machinery delivered by the plaintiff to the Montgomery Iron-Works Company, to be sold by the latter corporation, as the agent of the plaintiff, under an arrangement by which, as agent, it in substance agreed to account for, or guarantee, the payment of a certain fixed price for all machinery received and sold by it, and was to take for its own benefit all profits received from purchasers over and above this fixed price.

The charter of the Montgomery Iron Works Company shows that this company was organized for the purpose of “manufacturing and repairing machinery,” and for no other object; and it was expressly prohibited from contracting any debt, without the written consent of its board of directors.

Under this state of facts, we hold that it was wholly outside of the scope and purposes for which this corporation was created to act as the agent of the plaintiff in making sales of machinery. The power to manufacture and repair machinery, coupled with a prohibition against the creation of debts, except in a mode particularly specified, does not confer by implication the power to act as agent in making sales of machinery manufactured by others, and of taking and indorsing notes executed for the purchase-money. The act was clearly *ultra vires*, and being such, under the uniform rulings of this court, the contract was void, and the doctrine of estoppel can not be invoked by the plaintiff to debar the interposition of this defense. To permit this would practically be giving the sanction of the court to the doctrine, that a corporation can become omnipotent by arrogating to itself power forbidden by its charter, which is the vital source and origin of all corporate power.—*Chambers v. Falkner*, 65 Ala. 449; *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Grand Lodge of Ala. v. Waddill*, 36 Ala. 313; *Waddill v. Ala. & Tenn. R. R. Co.*, 35 Ala. 323; *City*

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*Council v. Montgomery Plank-Road Co.*, 31 Ala. 76; Wood's Field on Corp. (2d Ed.), § 243.

The note being void as against the maker—as much a nullity as if made by a married woman or a lunatic—the payee could not give it any validity, by indorsing it to one fully cognizant of all the facts attending its creation. Nor could it incur a liability as indorser of a void note, especially of negotiable paper, relating to a transaction which was beyond the scope of its corporate powers.—Green's Brices' Ultra Vires, (2d Ed.) 252, 255–256; 1 Daniel Neg. Instr. (3d Ed.), §§ 377 *et seq.*

These views result in the affirmance of the judgment in each of the two causes under consideration, which is accordingly adjudged.

## East Tenn., Va. & Ga. Railroad Co. v. Lockhart.

*Action for Damages, by Passenger against Railroad Company.*

1. *Damages to passenger carried beyond his destination on railroad.* In an action against a railroad company as a common carrier, by a passenger who was carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination.

2. *Same; fright and consequent injuries.*—The plaintiff, who was a young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she was not familiar, would naturally be frightened by her condition and surroundings, and attempt to walk rapidly along the track back to the station; and for damages resulting from these natural consequences of the defendant's wrongful act, a recovery may be had.

3. *Same; plaintiff's sickness, and roughness of track, as evidence.*—The fact that the plaintiff was sick when she left the train, though the conductor was ignorant of it, is competent and admissible evidence for her; not as an element of damages, but as tending, in connection with other circumstances, to show the relation between the subsequent aggravation of her sickness and the defendant's original wrongful act; and the rough condition of the track back to the station, over which she walked, is admissible as evidence for the same purpose.

4. *Same; sickness as element of damage.*—Whether the plaintiff's aggravated sickness was a proximate consequence of the defendant's wrongful act, is a question of fact for the determination of the jury; and if so found by them, it is an element of the damages she is entitled to recover.

APPEAL from the Circuit Court of Chilton.

Tried before the Hon. JAMES E. COBB.



[East Tenn., Va. & Ga. Railroad Co. v. Lockhart.]

This action was brought by Louisa Lockhart, an infant, suing by her next friend, against the appellant as a common carrier, to recover damages on account of personal injuries; and was commenced on the 2d January, 1884. The complaint alleged that the plaintiff, having procured and paid for a ticket on the defendant's road from Calera, in Shelby county, to Dixie, in Chilton county, was carried more than a mile beyond her destination, and put off at Keyser's Mill, with her baggage, remote from the station, alone and unprotected, whereby she was greatly frightened and injured, and became sick and enfeebled, &c. The defendant demurred to that part of the complaint which alleged fright, and claimed damages on account of it, on the ground that fright was not an element of damages in such case; but the demurrer was overruled, and the cause was tried on issue joined on the plea of not guilty.

On the trial, as appears from the bill of exceptions, the plaintiff's evidence showed that, on the 13th October, 1883, her father purchased for her, at Calera, a ticket to Dixie, and placed her on the train, in charge of the conductor; that she was then about eight years old, "and was sick." To this last statement, as to plaintiff being sick, the defendant objected, and excepted to its admission as evidence. "The evidence tended to show, also, that the train did not stop at Dixie, but stopped so that the coach, in which plaintiff was riding, was about fifteen or twenty yards from the platform, or place where passengers usually got off, where it was as convenient and safe for getting off as at the usual stopping-place; that the train stood there long enough for passengers to get off, but neither the conductor nor any one else notified plaintiff that she was at Dixie, nor was the name of the station announced, nor did she know that it was Dixie station, nor did any one offer to assist her off; that the train passed on, and, when about a mile beyond, plaintiff asked the conductor how soon they would reach Dixie, and he told her they had already passed it; that the train continued on to Keyser's Mill, about a mile and a half beyond Dixie, where the conductor put her off, with about twenty pounds of baggage; that plaintiff was frightened, and otherwise greatly distressed in mind and body; that she walked back to Dixie on the defendant's railroad track, and that the road was rough." The defendant objected to that part of the evidence showing that the plaintiff was frightened, and also to that part showing that the road was rough; which objections were each overruled, and the defendant excepted. The evidence tended to show, also, that plaintiff, in walking from the mill back to said station on defendant's road, had to walk over several trestles; to which evidence the defendant objected, and duly excepted to its admission. The evidence

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tended to show, also, that plaintiff knew no other way to get back from the mill to the station; and the evidence further tended to show that, when plaintiff's father next saw her, which was on October 17th, she could scarcely sit up. To this evidence, as to plaintiff's condition on the 17th October, defendant objected, and duly excepted to its admission."

The overruling of the demurrer to the complaint, and the several rulings of the evidence to which exceptions were reserved, are now assigned as error.

HENRY WILSON, for the appellant.

WATTS & SON, *contra*.

CLOPTON, J.—The action is in *tort*, and is brought by the plaintiff to recover damages for injuries sustained by the negligence and wrong of the defendant in carrying her more than a mile beyond the station which was her destination, and turning her off the train. The negligence and wrongful conduct of the defendant's servants are not controverted. The assignments of error are mainly directed to the relevancy and competency of evidence, respecting the physical condition of the plaintiff, her fright, the condition of the road over which she returned to the station, and her subsequent sickness, which was admitted against the objection of defendant. The bill of exceptions does not purport to set out all the evidence, nor does it state for what purpose the particular evidence was offered. If, therefore, it was admissible for any legal purpose, the record fails to affirmatively show error.

Negligence and wrongful conduct having been established, the general rule is, that the defendant is liable for the natural and proximate damages resulting therefrom—such consequences as might probably ensue in the natural and ordinary course of events. Though the defendant is not responsible for any events produced by independent intervening circumstances, which have no connection with the primary act; if the intervening agencies are put in operation by the wrongful act of the defendant, the injuries directly produced by such agencies are proximate consequences of the primary cause, though they may not have been contemplated or foreseen. The relation of cause and effect between the tortious act and the intervening agencies being shown, the same relation between the primary wrong and the subsequent injuries is also established; the first wrongful act operating through a succession of circumstances, each connected with, and originated by the next preceding.

The plaintiff was sick at the time she was turned off the train. It may be said the conductor was ignorant of her phys-

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ical condition. Ignorance, in such case, is no excuse, and the defendant is responsible, as if he had full knowledge of the fact. Evidence of her ailment is admissible, not as an element of damage, but as tending, in connection with other circumstances, to show the connection between the subsequent aggravation of the sickness and the wrongful act—*Brown v. C., M. & St. P. Ry Co.*, 54 Wisc. 342.

The plaintiff was a child about eight years of age. Fright was a natural consequence, on being put off the train alone, and at a place with the surroundings of which it appears she was unacquainted, some distance beyond the station where she expected to meet her friends, and might and ought to have been contemplated and foreseen. It was natural that a child of such tender years should endeavor to go back to the proper station with all practicable haste, and without consideration of consequences. She was placed in a position where it was necessary to act, to avoid the direct consequences of the wrongful act of the defendant; and having no one to assist or direct her, and knowing no other way, it was reasonable that she should proceed to walk to the station over the road-bed of the defendant. If it was requisite to proceed on foot by the only known way, using care and discretion, commensurate with her age, and by so doing aggravated her sickness, such aggravation constitutes an element of the damages, which she is entitled to recover.—*Brown v. C., M. & St. P. Railway Co.*, *supra*; *Barbee v. Reese*, 60 Miss. 906; *Balt. City Pass. Railway Co. v. Kemp*, 61 Md. 74; *Lake Erie & Wes. Railway Co. v. Fize*, 11 Amer. & Eng. R. Cas. 109.

Whether the increased sickness, that subsequently occurred, was the proximate consequence of being carried beyond the place of destination, and then turned off the train, was a question of fact to be determined by the jury on a consideration of all the circumstances. Any evidence relevant to the issues, which tends to establish their relation to each other of cause and effect, is admissible. It was, therefore, permissible to prove the fright of the plaintiff, and the rough and dangerous condition of the road over which she was compelled to walk, as intervening circumstances, through which the primary causative act successively operated, and the consequences culminated in the ultimate material injury. Moreover, where a passenger is carried beyond his destination, he is entitled to recover damages for the trouble and inconvenience in getting back to the point of destination. The fright of the plaintiff directly produced by the wrongful act, and contributing to the consequent increase of sickness, and the trouble, inconvenience, peril and fatigue of the necessitated return to the station beyond which she had been carried, were elements of damage,



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proper to be considered by the jury, in connection with her aggravated physical suffering.—*Drake v. Kiely*, 93 Penn. St. 492; *Seger v. Barkhamstead*, 22 Conn. 290; *Balt. P. & C. R. Co. v. Pixley*, 61 Ind. 22; *C. H. & I. R. Co. v. Eaton*, 94 Ind. 474; 2 Wood's Railway Law, 1232; 3 Sutherland on Damages, 259.

Affirmed.

## Banks v. Long.

### *Bill of Review for Error Apparent, and on New Evidence.*

1. *Bill of review for error apparent; what may be considered.*—On application for a bill of review on the ground of error apparent, no question arising as to any gross mistake or omission in the preparation of the original cause, the court can only consider the facts ascertained, as shown by the pleadings, admissions of facts, and facts asserted as such in the decree and opinion of the court, or necessarily implied in the decree rendered.

2. *When mortgagee, or his assignee, is not purchaser for valuable consideration.*—When a mortgage is given merely as security for a pre-existing debt, no new consideration entering into the transaction, the mortgagee is not entitled to protection against an outstanding equity of which he had no notice, as a purchaser for valuable consideration; and if he transfers his interest as collateral security for an existing debt, without any new consideration, his assignee is not a purchaser for value.

3. *Bill of review, on ground of new evidence.*—To sustain a bill of review on the ground of newly discovered evidence, it must appear that the additional evidence was not known at the time of the former hearing, and could not have been ascertained by the exercise of proper diligence; and the new evidence, with the other testimony already in, must entitle the complainant to a decree more beneficial to him than the decree already rendered.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed, by leave of the court, on the 1st March, 1884, by William H. Banks and George P. Swift & Son, a partnership, against Mrs. Josephine Long, the wife of James W. Long; and sought to review and reverse a decree rendered in a former suit, in which Mrs. Long was the complainant, and her husband, said W. H. Banks and Geo. P. Swift & Son were the defendants. The original bill in that case was filed on the 13th June, 1881, and sought to establish, in favor of Mrs. Long, a resulting trust in a house and lot in the town of Hurtville, containing about four acres, on the ground that it was bought for her by her husband, and paid for with moneys belonging

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to her statutory separate estate ; and that the defendants, when they acquired the legal title under some arrangement with her husband, were chargeable with notice of her equitable rights. On final hearing in that case, on pleadings and proof, the chancellor rendered a decree for the complainant ; and the bill of review sought to review and reverse that decree, on the grounds of error apparent in the decree, and of newly discovered, which was not known on the hearing of the original cause. The chancellor overruled a demurrer to the bill of review, for want of equity, but dismissed it on final hearing on the merits ; and his decree is now assigned as error.

JAS. T. NORMAN, for the appellants.

J. F. WADDILL, *contra*.

STONE, C. J.—James W. Long had purchased a lot of ground from the Hurtville Mill Company, but had received no title therefor. A dwelling-house was erected thereon. Being indebted to Banks, Long caused the title to the lot to be made to him, not in absolute right, but as a mortgage security for the sum he owed him. Banks was indebted to Swift & Son, and assigned his interest in said property, not by mortgage, or other conveyance, but as collateral security for such indebtedness. At this stage, Mrs. Josephine Long, wife of James W. Long, filed her bill against said James W., her husband, and against Banks and Swift & Son ; and claimed and averred that the lot was purchased and the improvements erected with moneys of her statutory separate estate, and she prayed that title be decreed to her as such. Banks and Swift & Son defended the suit, and denied that the money expended in the purchase and improvement of the lot was of the statutory or other estate of Mrs. Long. They also pleaded that they were each *bona fide* purchasers of said property for a valuable consideration, and without notice of Mrs. Long's equitable claim. Testimony was taken on each side of the issues, the cause submitted to the chancellor, and he rendered his final decree, granting to Mrs. Long full relief. Thereupon defendants petitioned for a rehearing, which the chancellor refused. This refusal was in March, 1883, immediately after the final decree was rendered.

In March, 1884, Banks and Swift & Son, with leave of the court, filed the present bill of review, and seek to have said cause reheard and reversed, on two grounds : first, for alleged error apparent ; and second, on newly discovered evidence. The chancellor dismissed the bill on the merits, and his decree is assigned as error.

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These questions depend on principles entirely different, and we will consider them separately. First, we will consider the question of error apparent on the face of the decree. In considering this question, we are not allowed to look at the testimony given on the former trial. The sufficiency of the testimony to sustain the conclusions the chancellor reached, would have arisen and been considered, if the case had come before us on an appeal from that decree. Coming, as it does, on alleged error apparent, we can consider only the facts ascertained, as shown by the pleadings, admissions of facts, and facts asserted as facts in the decree and opinion of the court, or necessarily implied in the decree rendered. We speak not now of those gross mistakes and omissions in the preparation of the cause, which have sometimes sustained a bill of review. No such question arises in this case. The sole question here presented is, whether from the ascertained facts, as shown by the pleadings and the chancellor's announcement of the facts found, it is apparent he erred in the decree rendered.—*McDougald v. Dougherty*, 39 Ala. 409; *Noble v. Hallonquist*, 53 Ala. 229; *McCall v. McCurdy*, 69 Ala. 55; *Ashford v. Patton*, 70 Ala. 479.

The chancellor, in his opinion, finds and ascertains that the lot was purchased and the improvements made with Mrs. Long's money, her statutory separate estate. He finds, in the next place, that Banks received the conveyance as a mere security for a pre-existing debt, without any new consideration, or binding stipulation of forbearance, to uphold it. He further finds, that Banks only assigned and pledged his interest in the said security given him by Long, as collateral security for the debt he owed to Swift & Son, without any new consideration. On these ascertained facts, he correctly ruled, that Mrs. Long's equity was paramount to each and both of their claims.—*Wells v. Morrow*, 38 Ala. 125.

Is the averment of newly discovered testimony made good? If it is, then the complainants have shown themselves entitled to have the case retried on the new testimony taken, and on the testimony taken and used on the former hearing. It becomes, in such event, a trial *de novo*, and partakes of the nature of a new trial at law.—*McCall v. McCurdy*, 69 Ala. 65. There is this difference: If a new trial in a court of law is ordered, the necessary result is the setting aside of the former recovery; and the second trial proceeds, notwithstanding it may be shown the alleged newly discovered evidence was known before the first trial took place. The granting of the new trial destroys the first recovery, and the law court is not endowed with the moulding power of revoking the order granting the new trial, or of re-establishing the former judg-



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ment. When such bill is filed, even though permitted by the chancellor, this does not of itself destroy the original decree. It does not even suspend it, unless so ordered by the chancellor; and, for the protection of those interested in the decree, he may require a bond as a condition of suspension.—Code of 1876, § 3842; 2 Dan. Ch. Pr. 1582.

The equity of a bill of review, for newly discovered testimony, is the fact that it is newly discovered, and that, with the other testimony, it entitles the complainant to a decree different—beneficially different—from that rendered in the cause. It must be newly discovered; for, if known before the trial, or, if with proper diligence it would have been known, this is a complete bar to such relief. *Vigilantibus, non dormientibus, subservit lex.*—2 Dan. Ch. Pr. (Cooper's) \*1584, n. 3; 1 Brick. Dig. 667, §§ 399, 402.

Banks alone had the transaction with Long. Swift & Son knew nothing of the trade, and lived in a different State. Banks alone attempted to prove himself a purchaser. In his testimony, taken on the bill of review, he testified that, while the original suit was pending, and before decree rendered, he was informed by his own counsel of a fact, which fact ought to have put him on inquiry, and which, if followed up diligently, would have led to the discovery of the very important fact he now relies on as newly discovered. He was not diligent enough in following up the inquiry. He further testified, that he had given evidence “in the original cause between the parties. He does not know that he has acquired since any material information in regard to this matter.” This concession, coming as it does from the party most interested, and who was relied on to conduct, and did conduct the defense of the original suit, is fatal to the present suit. He not only fails to show he employed proper diligence in the preparation of his defense, but his testimony tends strongly to disprove the assertion that the alleged new testimony was discovered since the decree was rendered in the original cause. To allow relief, in such a case as this, would encourage carelessness in the preparation of causes, and greatly impair the conclusiveness of final decrees.

The decree of the chancellor must be affirmed.

**Kraft v. Lohman.**

*Bill in Equity by Wife, to remove Husband as her Trustee.*

1. *Removal of husband as trustee of wife's estate.*—On the testimony in this case, showing that the husband had permanently abandoned his wife, wasted her income by consuming it for his own personal use, grossly disregarded his fiduciary duties, was profligate and unfit for the discreet management of her property, the chancellor properly removed him as her trustee (Code, §§ 2717, 2728-9); and the character of her estate, whether statutory or equitable, is immaterial.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. JOHN. A. FOSTER.

The bill in this case was filed on the 4th March, 1885, against Peter Kraft, by his wife, who called herself Augusta Lohman, and who sought to remove him from the trusteeship of her statutory estate, and to enjoin him from interfering in any manner with her property. The bill alleged that the parties were married in 1866, but lived together only about three weeks, when the defendant abandoned his wife; that he had never contributed to her support, and had no regular business or employment; that he had never attempted to interfere with the management of her property, until within one year before the filing of her bill in this case, when he was made a party to a suit which she had instituted against Mrs. Louisa Bolman; that he then collected the interest due to her by the terms of the mortgage sought to be foreclosed in that case, and used and squandered it for his own personal uses. On final hearing, on pleadings and proof, the chancellor held the complainant entitled to relief, and rendered a decree according to the prayer of the bill; and his decree is now assigned as error.

R. P. DESHON, for appellant.—The defendant took no testimony, because the complainant failed to make out her case. She alleged that she owned a statutory estate, and that the defendant was wasting and squandering it; but her proof shows that the money loaned to Mrs. Bolman was her earnings during coverture, which belonged to her husband.—*Gordon, Rankin & Co. v. Tweedy*, 71 Ala. 214.

OVERALL & BESTOR, and L. H. FAITH, *contra*, cited *Boaz v. Boaz*, 36 Ala. 339; *Sloan v. Frothingham*, 72 Ala. 589; *Smith v. Oliver*, 31 Ala. 39; *Mead v. Hughes*, 15 Ala. 146; 17 Serg. & R. 130.

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SOMERVILLE, J.—It is entirely immaterial what may be the character of the wife's separate estate, described in the bill in this case—whether equitable or statutory, the action of the chancellor in removing the husband from the trusteeship of the property was free from error. That the property was the wife's, and not the husband's, we can entertain no doubt.

The testimony shows that he had permanently abandoned the wife, without sufficient excuse; that he was profligate, and unfit for the discreet management of her property; that he wasted her income, by consuming it for his own personal uses; and that he grossly disregarded his fiduciary duties in such manner as that, if his conduct is not checked by the strong arm of a court of equity, it will probably lead to the impoverishment of the complainant in very old age.—Code, 1876, §§ 2728–29, 2717; *Boaz v. Boaz*, 36 Ala. 334; *Sloan v. Frothingham*, 72 Ala. 589; 1 Perry on Trusts, (3d Ed.) § 275.

The decree of the chancellor removing him was, in our judgment, entirely free from error, and it is affirmed.

## **Strauss & Steinhardt v. Harrison.**

*Action on the Case by Landlord, against Purchaser of Tenant's Crop with Notice of Lien for Rent.*

1. *Rents, as between mortgagor and mortgagee.*—When a mortgagor is in possession, before default, he is not the tenant of the mortgagee, nor liable for rent, in the absence of a stipulation to the contrary in the mortgage; but, after default, or the happening of other contingency specified, the legal title and estate being vested in the mortgagee, he may make entry, or require the mortgagor to pay rent; and if he suffers the mortgagor to continue in possession, on his promise to pay rent, the relation of landlord and tenant, with all its rights and incidents, is thereby created between them.

2. *Mortgage of homestead.*—A mortgage of the homestead by husband and wife, the voluntary signature and assent of the wife not being shown and certified as required by law (Code, § 2822), is a mere nullity, and has no operation against the husband, by estoppel or otherwise; and a subsequent promise by him, after default, to pay rent to the mortgagee, no surrender or change of possession being shown, is without consideration, and does not create the relation of landlord and tenant between them.

3. *Same; certificate of wife's acknowledgment.*—A certificate, appended to a mortgage of the homestead by husband and wife, which states that the wife "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion on the part of her husband," is not a substantial compliance with the statute (Code, § 2822), which uses the words "fear, constraint, or threats on the part of the husband."



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APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Williamson Harrison against Strauss & Steinhardt as partners, to recover damages for the defendants' alleged wrongful act in receiving and selling six bales of cotton, on which plaintiff claimed a statutory lien as landlord, of which lien they had notice; and was commenced on the 24th October, 1885. The cotton was raised by one Grant, during the year 1885, on lands which had belonged to him, and which he had conveyed to the plaintiff by mortgage dated December 31st, 1883, in which his wife joined. The certificate appended to this mortgage, or the material part thereof, is copied in the opinion of the court. On the 16th December, 1884, which was after the law-day of the mortgage, said Grant executed to plaintiff his written obligation to pay six bales of cotton, as rent for the land during the year 1885; but there was no surrender or change of possession. On the 30th January, 1885, said Grant executed to the defendants a statutory note and mortgage for advances made and to be made during the year 1885; and the cotton raised by him was delivered to them in satisfaction of this indebtedness. The defendants requested the following charges to the jury: "(1.) If the jury believe the evidence, they must find for the defendants." "(2.) The mortgage from Grant to plaintiff is void as to the homestead of said Grant, and the plaintiff can not recover for any cotton raised on said homestead." The court refused each of these charges, and the defendants duly excepted to their refusal; and the refusal of these charges, with other rulings, is now assigned as error.

L. M. LANE, for the appellants, cited *Crim v. Nelms*, 78 Ala. 604; *Motes v. Carter*, 73 Ala. 553.

GAMBLE & RICHARDSON, *contra*.

CLOPTON, J.—The action is brought by appellee, to recover damages for the defeat of his lien as landlord on six bales of cotton, purchased by the defendants from Joseph Grant. The sole contestation is, whether the relation of landlord and tenant existed between the plaintiff and Grant. On December 31, 1883, Grant and wife executed to the plaintiff a mortgage on personal and real property, to secure an indebtedness therein described. The real property included, in addition to other land, the homestead of the mortgagor, which he had owned, and been in possession of since 1866, and was occupying as a homestead at the time the mortgage was made. In December, 1884, after the law-day of the mortgage, Grant

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executed to the plaintiff an obligation to pay six bales of cotton for rent of the premises during 1885. There was no entry, nor change of possession. Six bales of the cotton raised on the premises in 1885, the larger portion of which grew on the homestead land, were delivered by Grant to the defendants, who appropriated them to their own use.

Though the mortgagor, where by the terms of the mortgage he is entitled to possession until default, or the happening of some other contingency, is not a tenant, nor liable for rent until after the law-day, or the happening of the contingency, the legal title and estate, under the theory of mortgages as settled by our decisions, vest at law in the mortgagee, who is entitled to immediate possession, and who may make entry, or put the mortgagor out of possession, without notice to quit. Nothing remains in the mortgagor but an equity of redemption, and his continuance in possession thereafter is at the will, or by sufferance of the mortgagee, though he is not liable for rents and profits until the mortgagee becomes active in making claim. *Scott v. Ware*, 65 Ala. 174; *McMillan v. Otis*, 74 Ala. 560. The parties may contract, at the time of making the mortgage, that the mortgagee shall take and retain possession, with power to receive the rents and profits until default, or that the mortgagor may remain in possession on condition to deliver the produce, or a part thereof, or to pay stipulated rent. The mortgagee may subsequently purchase, in good faith, the equity of redemption, and may contract with the mortgagor in respect to the mortgaged premises, without his transactions being impeached simply because he is a mortgagee, though they may be subject to vigilant and strict scrutiny. After default, he may make entry, and rent the premises to any other person. There is nothing in the reason or policy of the law, or in the relation between the parties, which prohibits the mortgagee, when entitled to immediate possession, instead of making actual entry, to permit the mortgagor to remain in possession on an agreement to pay rent, which is the equivalent of a fresh letting. Such contract of rent creates the relation of landlord and tenant, with its incidents and rights; and imposes a liability to account for the rent so received, as a mortgagee in possession.

But, that the relation may arise, when the mortgagor is the true owner of the land, is in possession under title in himself, and occupying it as a homestead, at the time of the execution of the mortgage, and of the making of the rent contract, such contract must be founded on the mortgagee's right to possession, under a valid and operative conveyance.—*Crim v. Nelms*, 78 Ala. 604.

The officer, who took the wife's acknowledgment of the ex-  
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execution of the mortgage to the plaintiff, certifies, she "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion on the part of her husband." In *Motes v. Carter*, 73 Ala. 553, a certificate, in substantially the same language, was held to be insufficient to divest the title of the homestead. The mortgage, therefore, is a nullity as to the homestead. It confers no rights on the plaintiff, nor divests the mortgagor of any. It has no operation against the latter, by estoppel or otherwise. Under such mortgage, the plaintiff did not, and could not, acquire any right to possession of the homestead, as against the mortgagor, and could not interfere with, nor disturb his possession. The record shows that the mortgagor had been the owner of the land since 1866, and that he was in possession, occupying it and claiming it under his own title. In such case, in the absence of any other claim or pretense of right or title, a mortgage and the claim under it constitute no sufficient foundation, on which to uphold a contract effectual to create the relation of landlord and tenant.—*Crim v. Nelms*, 78 Ala. 604.

The well-declared policy of the State is to exempt, for the benefit of the debtor and his family, the homestead from sale under legal process for debt. Such exemption is founded on considerations of humanity and benevolence, and of the public weal—a preventive of pauperism. It is incorporated in the organic law, guarded by the provision, that a "mortgage, or other alienation of such homestead, by the owner thereof, if a married man, shall not be valid, without the voluntary signature and assent of the wife to the same;" and by statute, the voluntary signature and assent must be shown by an examination separate and apart from her husband, and attested by an official certificate in a prescribed form. The purpose is, that the owner and his family shall have the use, occupation and enjoyment of the homestead, and the appropriation of the income and profits to their benefit and support. To suffer the husband, by an unsupported agreement to lease, to place himself in a position, where he may be compelled to quit the occupancy of the homestead by a compulsory surrender of possession, and to sustain a diversion of the profits from the maintenance of the family to the payment of such rent, would be to defeat the benign purposes of the law by his mere recognition of the unfounded claim of a stranger, and to violate the established policy of the State. In respect to the homestead, the relation of landlord and tenant did not exist.

It results, that the plaintiff had no lien on the portion of the cotton which was raised on the homestead, but had a lien on that part which was raised on the mortgaged land in excess of



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the homestead. The second charge requested by the defendants should have been given.

Reversed and remanded.

## Louisville & Nashville Railroad Co. v. Whitman.

*Action for Damages against Railroad Company, by Ejected Passenger.*

1. *Liability of railroad company for wrongful acts of agents or servants; vindictive damages.*—A railroad corporation is liable for all acts of wantonness, rudeness or force, done or caused to be done by its agents or servants, in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by Elijah Whitman against the appellant, a corporation operating the South and North Alabama railroad, to recover damages for personal injuries sustained in being ejected by violence from one of the defendant's passenger trains; and was commenced on the 5th January, 1885. The cause was tried on issue joined on the plea of not guilty, and resulted in a verdict and judgment for plaintiff, for \$225. It was shown that the plaintiff, having purchased at Birmingham a ticket to Wheeling, a station on the Alabama Great Southern railroad, by mistake entered one of the defendant's trains, and, as his testimony tended to show, was forcibly ejected by defendant's servants, acting under the orders of the conductor, while the train was moving at the rate of about fifteen miles per hour; whereby he was thrown violently to the ground, and sustained serious injuries. The conductor and the brake-man, who were examined as witnesses for the defendant, denied that the plaintiff was forcibly ejected, but did not deny that he left or was put off the train while it was moving. An affirmative charge given by the court, and the refusal of two charges asked by the defendant, which are copied in the opinion of the court, are the only matters assigned as error.

HEWITT, WALKER & PORTER, for appellant.  
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WEBB & TILLMAN, *contra*.

STONE, C. J.—All the questions presented by this record, arose on charges given and refused. The testimony of and for plaintiff tended to show that he was forcibly, rudely and wantonly ejected from defendant's train, while it was running at the rate of about fifteen miles per hour, and that this was done under the command of the conductor of the train. Testimony for defendant was in palpable conflict with this. A question of the weight of evidence was thus presented, for decision by the jury. The verdict was for the plaintiff, and it is thus shown that the jury was convinced that rudeness and undue force, one or both, had been employed in removing plaintiff from the train.

The court instructed the jury that, if they found for the plaintiff, in estimating the damages, they "should consider plaintiff's mental suffering, whether such mental suffering was caused by terror and anxiety at the time he was thrown off the train, or from the indignity and insult to which he was subjected."

The charge asked by defendant, and refused, is in the following language: "If the jury believe from the evidence that, when a person is found on one of defendant's trains through mistake, the instructions given by defendant to the conductor managing such train are to stop the train, and put such person off; and if the jury further believe from the evidence that plaintiff was on the train of the defendant through mistake; and if the jury further believe from the evidence that, when the defendant's conductor found the plaintiff on the train, he did not stop the train, but seized the plaintiff, or caused the plaintiff to be seized and thrown from the train; then said acts of the conductor in thus removing the plaintiff from the train were not within the scope of the conductor's employment and authority." There was a second charge asked and refused, with substantially the same hypothesis and conclusion as those stated above, with the superadded clause, that "the defendant is not responsible therefor," unless the defendant had given such direction, or had ratified the act after being informed of it. Plaintiff's phase of the testimony justified the hypothesis of these charges, and hence they were not abstract.

There was no error in either of these rulings. The clearly established doctrine now is, that railroad corporations are liable for all acts of wantonness, rudeness or force, done, or caused to be done, by their agents and employees, if done in and about the business or duties assigned to them by the corporation; and the rule for vindictive or punitive damages against such corporations, for abuse by their employees of the duties and

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powers confided to them, is the same as that which applies to natural persons, who are guilty of similar misconduct. \* It is confined, however, to abuses perpetrated in the line of duties assigned them, and does not extend to any tort, wantonness, or wrongful act the employees may commit, in matters not connected with their services to the railroad corporation. In the line of their assigned duties, they stand in the place of the corporation; without that line, the corporation is bound by nothing they may do.—1 Sedgw. Dam. \*136, n. a.; *Goddard v. Gr. Tr. Railway Co.*, 57 Me. 202; *Meagher v. Driscoll*, 99 Mass. 281; *Hawes v. Knowles*, 114 Mass. 518; *Atl. & Gr. W. Railway Co. v. Dunn*, 19 Ohio St. 162; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Singer Manf. Co. v. Holdfast*, 86 Ill. 455; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *S. & N. Ala. R. R. Co. v. McLendon*, 63 Ala. 266; 2 Sedgw. Dam. (7th Ed.), 328, note; *Railroad Co. v. Hanning*, 15 Wallace, 649.

The judgment of the City Court is affirmed.

## Ware v. Swann & Billups.

### *Ejectment by Trustees of Railroad Lands.*

1. *Deed of railroad corporation, executed by agent; consideration.* Held, re-affirming *Standifer v. Swann & Billups* (78 Ala. 88), that a conveyance of lands which belonged to the Alabama & Chattanooga Railroad Company, executed by J. C. Stanton as general superintendent and attorney in fact, without written authority from the board of directors, or other governing body of that corporation, passed no title or estate of which a court of law could take cognizance; that if the corporation be held to have ratified the act of such agent in making the sale and conveyance, by its knowledge of the facts and its failure to dissent, such ratification could only operate as an equitable estoppel, which is not cognizable at law; and that under the provisions of the act approved February 11th, 1870, authorizing the railroad company to sell a part of the lands, but requiring the proceeds of sale to be "appropriated to the payment of the first mortgage bonds of said company" (Sess. Acts 1869-70, p. 89, § 17), the lands could only be sold for money.

2. *Limitation of action.*—The title to the lands embraced in the grant by Congress to the State of Alabama, for the benefit of certain railroads (11 U. S. Stat. at large, p. 17), was vested in the State as trustee, until the completion of the railroad, except as to the lands embraced in the first continuous length of twenty miles, which might be sold at an earlier day; and the statute of limitations not running against the State while the lands were so held, it did not begin to run against the railroad company until, by the completion of the road, it acquires the right to sue.

3. *Commencement of action; declaration and notice.*—In an action of  
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ejectment proper, the declaration and notice serve the purpose of a summons and complaint; and the commencement of the action dates, not from the time they are served on the defendant, but from the time they are placed in the hands of the sheriff to be served; and this will be presumed, in the absence of evidence to the contrary, to be the day on which the notice bears date.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. LEROY F. BOX.

This action of ejectment was brought to recover certain lands, containing 640 acres in all, being subdivisions of three separate sections. The notice, accompanying the declaration, was dated May 10th, 1881, but was executed, as shown by the sheriff's return, on the 9th June, 1881. The plaintiffs were John Swann and John A. Billups, trustees in a deed of trust executed by Governor Houston, in the name of the State of Alabama, dated February 8th, 1877, by which all the lands and other property embraced in the mortgage executed by the Alabama and Chattanooga Railroad Company to the State, dated March 2, 1870, were conveyed to said trustees under the provisions of the act of the General Assembly approved February 23d, 1876, known as the "Debt Settlement Act." The lands sued for were embraced in the grant of public lands by Congress to the State of Alabama to aid in the construction of certain railroads; which act was approved June 3d, 1856, and its provisions renewed and extended by a subsequent act approved April 11th, 1866. These acts of Congress, which were read in evidence on the trial by the plaintiffs, may be found in the United States Statutes at large, vol. 11, pp. 17-18; vol. 16, pp. 45-6. The plaintiffs read in evidence, also, the said mortgage executed by the railroad company to the State, with its probate in the counties in which the lands conveyed were situated, the deed executed by Governor Houston to said Swann and Billups, and the said act approved February 23d, 1876, which authorized its execution. The plaintiffs proved, also, that these lands were located and set apart, with others, to the Wills Valley Railroad Company, one of the railroads specified in said act of Congress, of June 3d, 1856, to whose property and rights the Alabama and Chattanooga Railroad Company afterwards succeeded; that said Wills Valley railroad was located in October, or November, 1858, and was completed in January, 1870; and that the Alabama and Chattanooga railroad was completed on the 17th May, 1871.

Cephas Fenton and his wife, Juliette Fenton, with H. H. Brandon, were named as defendants in the notice of the casual ejector; and the notice was served on the 9th June, 1881, as above stated, on said Brandon only. A judgment by default was entered against all of said defendants, which was after-

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wards set aside on motion of George C. Ware, who was then let in to defend as landlord, entered into the usual consent rule, and pleaded not guilty. Said Ware claimed the lands under a conveyance to him by said Fenton and wife, which was dated December 19th, 1870, and a conveyance to Mrs. Fenton by John C. Stanton, as general superintendent and attorney in fact of the Alabama and Chattanooga Railroad Company, which was dated October 13th, 1870. The deed of said Stanton conveyed other lands besides those here sued for, and recited as its consideration the present payment of \$2,200; but the plaintiffs proved by D. J. Duffy, who was at the time an agent and land commissioner of said railroad company, that the real consideration was the exchange of other lands in Ohio, and that the lands sued for were rated in the exchange at \$2.50 per acre. There was no proof that Stanton had any written authority to sell said lands, or to make any other sales of land, or that he was authorized to do so by a resolution of the board of directors of the railroad company; but it was proved that he had made many other sales as agent and general superintendent, and left with said Duffy, the land commissioner, blank deeds signed by himself, which were to be filled up and delivered on his report of a sale and the payment of the purchase-money. One Standifer, a witness for the defendant, who had testified that Stanton made many sales along the line of the road, and publicly advertised the lands for sale in the newspapers at Chattanooga, was asked by the defendant, "if he ever heard said Stanton say anything, in the presence of the president and several stockholders of said railroad company, as to his authority to sell the railroad lands;" also, "if he ever heard the president and stockholders of said company, in the presence of said Stanton, speak of the latter's authority to sell said lands for the company." On objection by plaintiffs, the court refused to allow the witness to answer these questions; to which rulings exceptions were duly reserved by the defendant.

On all the evidence adduced, the court charged the jury, that they must find the issues in favor of the plaintiffs, if they believed the evidence; and to this charge the defendant excepted.

DUNLAP & DORTCH, for appellant.

SAMUEL F. RICE, *contra*.

SOMERVILLE, J.—The action is one in ejectment, in which the plaintiffs have elected to frame their pleadings and proceed according to the rules of the common law governing

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that form of action, as they were authorized to do by the statute.

There is no denial of the fact, that the plaintiffs' title to the land in controversy will authorize a recovery by them, unless it was divested by the deed, purporting to be made in the name of the Alabama and Chattanooga Railroad Company, on October 13th, 1870, by J. C. Stanton, as general superintendent and attorney in fact of that corporation, conveying to Mrs. Julia Fenton, from whom the defendant derives title; or, unless the defendant's possession has matured into a good and superior title by operation of the statute of limitations applicable to an action of ejectment, which is ten years.

The first point is directly settled against the appellant by the case of *Standifer v. Swann & Billups*, trustees, decided at the last term.—78 Ala. 88. It was there held, that a deed to these lands made by John C. Stanton, without written authority from the board of directors, or other governing body of the railroad company for which he purported to act as agent, conveyed no legal title to the grantee, or any estate of which a court of law would take cognizance. It was further said, that the lands could lawfully be sold only for cash or money in hand, or the promise of it. There is no essential difference between the facts of this case and that. The record fails to show that Stanton was possessed of any other than oral authority to make the deed, and this was without any legal efficacy. The consideration paid by the first grantee was not money, but land situated in another State. The grantee in the deed acquired no title, and, having none, she could convey no more than she had to the defendant.

The only remaining reliance of the appellant is the statute of limitations of ten years.

When did the statute commence to run? This question was fully discussed in *Swann & Billups v. Lindsey* (70 Ala. 507), and *Swann & Billups v. Larmore* (70 Ala. 555); and we need add but little to what is said in those cases. In the former of those cases, this court entered at length upon a discussion of the proper construction of the several acts of Congress making a grant of these lands in aid of the North-East and South-West Alabama Railroad and of the Wills Valley Railroad, and the subsequent act of April 10, 1866, reviving and renewing the grant for three years in favor of these roads, the corporate existence of each of which was merged by consolidation into a new corporation known as the Alabama & Chattanooga Railroad Company, under the act of October 6, 1868, authorizing such consolidation; and the conclusion was reached, that the statute of limitations was in abeyance until the completion of the railroads for the benefit of which the grant was made. The



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reason assigned was, that the title to lands occupying the *status* which these do, remained in the State, as trustee, until this event occurred, and no one else had any right to bring suit for them; and inasmuch as time never runs against the State, its title was entirely unaffected by lapse of time. The railroad company, it was added, could maintain no action, legal or equitable, until it acquired the title, or a right to the possession; and this contingency could never happen until the road was completed.—*Swann & Billups v. Lindsey*, 70 Ala. 507, *supra*.

When the deed was made by Stanton, in October, 1870, the Wills Valley Railroad Company, as we have said, had no separate corporate existence, but had become merged into the Alabama & Chattanooga Railroad Company. It never afterwards had the power to sue, its rights in this particular being transferred to its successor.—Acts Ala. 1868, pp. 207–209. The new company alone, after this, had the right to sue for these lands, and not then until the completion of the entire road. This was accomplished on May 17, 1871; and the statute of limitations became capable of operation from that day, by the existence or occurrence of the requisite conditions to set it in motion.

It is contended that the action is nevertheless barred, because it must be considered as having been commenced on June 9, 1871, when the declaration and notice in ejectment were actually served on the tenant in possession, and not on the 10th day of May, 1871, when these papers were filed in court and went into the hands of the sheriff for service. If the premises be admitted, the conclusion necessarily follows, because more than ten years would have elapsed before the day of such service.

The rule of the common law undoubtedly was, that the service of the declaration and notice on the tenant in possession of the premises sued for, was considered as the commencement of the action. The practice was for the lessor of the fictitious plaintiff, either himself or by his agent, to make delivery of the declaration and appended notice, to the tenant in possession, prior to the term of the court at which he was required to appear; and upon making proof of this service by affidavit, he could obtain judgment *nisi* against the casual ejector, the court permitting the tenant to appear and defend only by entering into the consent rule, confessing the fictions of lease, entry, and ouster, as alleged in the declaration. This declaration and notice subserved the purpose of a writ, and constituted the process by which the defendant was brought into court.

The Code now provides, that “the suing out of a summons is the commencement of a suit, whether it be executed or not,

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if the suit be continued by an *alias*, or re-commenced at the next term of the court;" and this is made applicable to all kinds of actions, real as well as personal and mixed.—Code, 1870, §§ 3243, 2924. It is true, as argued, that in actions of ejectment according to the common-law form, there is strictly speaking no summons, but only the declaration, with a notice annexed to it and signed by the casual ejector, which is served on the defendant, notifying him to appear and defend as the real party in interest. Under our practice, they are filed with the clerk of the court in which it is proposed to bring the action, and he places them in the hands of the sheriff, to be served by him as other process. This is precisely the practice pursued in other forms of actions commenced by summons and complaint, including real actions in the nature of ejectment. There is no reason why we should unsettle the prevailing opinion that the same rule is applicable to each. The declaration is nothing more than our complaint, except in form only. Where the declaration and notice, after being filed with the clerk, are placed by him in the hands of the sheriff, or his deputy, to be served, they become process, the execution of which brings the defendant into court, and the action is commenced from the moment such process is sued out, or issued. The negligence of the sheriff in discharging his duty is not to be visited on the plaintiff, who is himself free from every imputation of negligence. And in the absence of any evidence to the contrary, by indorsement on the paper or otherwise, the time when process issued will be presumed to be the day of its date.—Angell on Lim., §§ 311, 312.

In this view of the law, the action was commenced on May 10, 1881, the day of the filing of the declaration and the date of the notice, and not, as contended by appellant, on June 9th following, when the process was served by the sheriff.

The other points raised are rendered unimportant by this view of the law. The court did not err in giving the general charge to find for the plaintiffs, and the judgment is affirmed.

## Smith v. Fields.

*Trover and Case, by Mortgagee against Purchaser of Crops.*

1. *Description of property in mortgage; parol evidence in aid of.*—A mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the general descriptive words may be made definite and certain by parol evidence showing that the parties

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had reference to the crop to be raised by the mortgagor on the plantation in the county which he was then cultivating.

2. *Registration as constructive notice; liability of purchaser to mortgagee.*—A mortgage of crops not yet planted, if duly recorded in the county in which the lands lie, is constructive notice to a purchaser of the crops after they have been gathered; and he is liable to the mortgagee in trover, or a special action on the case.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by Abijah E. Fields, against Thomas Smith, to recover damages for the conversion of nine bales of cotton; and was commenced on the 16th April, 1885. The complaint contained two counts in trover, and a special count in case; and the only plea was "the general issue, in short by consent, with leave to give in evidence any special matter which would be good if specially pleaded. The cotton was raised by one Isham Bentley, during the year 1884, on a plantation which he was cultivating in Blount county; and was carried by him to Birmingham, in December, 1884, and there sold to the defendant, who paid the full market price, about \$400. The plaintiff claimed the cotton under a mortgage executed to him by said Bentley, which was dated March 8th, 1884, and purported to be given to secure said Bentley's note for \$200, of even date with the mortgage, and payable on the 1st October, 1884. The property conveyed by the mortgage was described as "my entire crop of cotton and corn," with a mare, several cows, &c. The mortgage was signed by mark only, the signature being attested by one witness; and it was filed for record in the office of the probate judge of Blount county, on the 8th March, 1884, but without acknowledgment or probate.

On the trial, as appears from the bill of exceptions, the plaintiff offered the mortgage in evidence, having proved its consideration, execution, and registration; and having further proved "that said Isham Bentley, at the time of the execution of said instrument, owned and was cultivating a farm in Blount county, proposed to prove, by parol, that the said mortgage was intended to cover the crop of cotton and corn to be grown by said Bentley, on his said place, during the year 1884." The court admitted this evidence, against the objection of the defendant, and he excepted to its admission. "The defendant introduced evidence showing that he purchased the cotton from said Bentley in good faith, and that he had no knowledge whatever that plaintiff had any mortgage, or claim of any kind on said cotton, until after he had bought the cotton and paid for it." This being all the testimony, and the case having been submitted to the decision of the court without a jury, the court



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found the issue in favor of the plaintiff, and rendered judgment in his favor, for the amount due on his mortgage debt. The defendant excepted to the judgment, and here assigns it as error, together with the admission of the evidence to which, as above stated, he had excepted.

HEWITT, WALKER & PORTER, for appellant.

LANE, TALIAFERRO & TABOR, *contra*.

CLOPTON. J.—Generality and indefiniteness in the description of the property are not sufficient to avoid a mortgage. There must be uncertainty, which remains after the mortgage has been interpreted in the light of the attendant circumstances, the clear intent of the parties being regarded. It must be conceded that the description—"my entire crop of cotton and corn"—is very general and indefinite; but it is capable of being made reasonably certain, without violating any rule of evidence. The mortgage was executed, March 8th, 1884, to secure an obligation of the same date, which was given in consideration of a mare and goods purchased, and supplies to be furnished, and payable October 1, 1884. Evidence, in connection with these circumstances, that the mortgagor, at the time of its execution, owned a farm in Blount county, and of the quantity of crops grown thereon, reasonably removes the uncertainty, and manifests the intent of the parties that the mortgage should cover the entire crop of cotton and corn raised by the mortgagor on his farm during the year 1884.—*Connally v. Spragins*, 66 Ala. 258; *Ellis v. Martin*, 60 Ala. 394; *Varnum v. State*, 78 Ala. 28.

When the mortgage is on an unplanted crop, any person who converts it to his own use after it is gathered, with actual or constructive notice of the lien, is liable to the mortgagee in an action on the case.—*Rees v. Coats*, 65 Ala. 256. The description of the property in the mortgage, though general, is sufficient to put on inquiry; and the defendant, purchasing from the mortgagor, was bound to ascertain whether the cotton he purchased was the same conveyed by the mortgage. Registration of such mortgage in the proper office is constructive notice.

Affirmed.

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### *Action for Damages on account of Collision between Railroad Cars.*

1. *Contributory negligence; burden of proof as to.*—Contributory negligence is a defense, the burden of proving which rests on the defendant, although it may be negated by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it.

2. *Demurrer to special plea; error without injury in ruling on.*—Improperly sustaining a demurrer to a special plea is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but the principle does not apply to the erroneous overruling of a demurrer to a bad special plea, whereby the plaintiff is compelled to take issue on it.

3. *Collision of moving train with cars on side-track; contributory negligence, as affected by speed of train and location of cars.*—In an action by a railroad company, to recover damages on account of injuries caused by a collision of one of its trains with several empty cars left standing on a side-track by the defendants' servants, if the empty cars were left standing too near the main track, but a collision might, nevertheless, have been avoided by the use of reasonable diligence on the part of the persons who were in charge of the passing train, the defense of contributory negligence would be made out; and in this connection, the speed of the train, and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material facts. But, if the empty cars were not placed too near the main track, but were insecurely scotched on the down grade of the side-track, and, being put in motion by the passing train, rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff.

4. *Liability of master for negligence of servant.*—A gas company having exclusive possession and control of the side-track of a railroad adjacent to its works, for the receipt and delivery of coal, and having employed an adjoining proprietor to unload the coal delivered on a train of cars; if the cars, when unloaded, are negligently placed or left by said proprietor's servants so near the main track of the road as to cause a collision with a passing train, he and his employer, the gas company, are jointly liable to the railroad company for the damages thereby caused.

5. *Contributory negligence in construction of side-track.*—In such action, a plea averring contributory negligence by plaintiff, in that "said side-track was constructed by plaintiff in an unskillful and improper manner," is demurrable, since such negligence would be too remote from the injury.

6. *Honest mistake as defense.*—If the empty cars were placed by the defendant's servants so near the main track of the plaintiff's road as not to allow room for passing trains, the defendants can not claim immunity from liability, on the ground that this was the result of an honest mistake on the part of their servants.

[Montgomery & Eufaula Railway Co. v. Chambers & Abercrombie.]

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the Montgomery and Eufaula Railway Company, a domestic corporation, against Chambers & Abercrombie as partners, and the Montgomery Gas-Light Company, a private corporation, to recover damages on account of injuries to a train of cars belonging to plaintiff, caused by a collision with several empty cars standing on a side-track, and alleged to have been caused by the negligence of the defendants' servants in leaving the empty cars standing at the place. The injury occurred on the 10th October, 1883, and the action was commenced on the 17th November, 1883. The defendants jointly pleaded not guilty, and a special plea averring contributory negligence, in these words: "For further answer defendants say, the said side-track was made by the plaintiff as part of its railway, for the use and benefit of the plaintiff, and was, at the time of the commission of the alleged grievance, in the possession, and under the control of the plaintiff; that for a long time previous to the time of said alleged grievance, the Louisville and Nashville Railroad Company had, with the knowledge and consent of said plaintiff, delivered for defendants, on said side-track, cars loaded with coal, to be then and there unloaded by defendants, and, after being unloaded, to be taken away by said L. & N. R. R. Company; for which defendants paid said railroad company one dollar for each car so delivered, and also paid plaintiff sixty cents for each car, for the use of said side-track for the purpose of unloading the same. And defendants further say, that, at the time of said alleged grievance, said L. & N. R. R. Company had delivered on said side-track three or more cars loaded with coal, to be unloaded; and two of said cars, having been unloaded, were pushed out of the way, so that another loaded car might be put in proper position to be unloaded; but said two cars were not pushed far enough to impede or obstruct a train passing on plaintiff's main track of railroad; and defendants were at that time using said side-track in the manner and for the purpose for which they paid plaintiff as aforesaid, and in no other manner, and for no other purpose. And defendants further say, that by an ordinance adopted by the city council of Montgomery, which was then in force, it was made unlawful for any person to cause, permit or suffer any locomotive engine to run within the limits of the city of Montgomery, at the place where said alleged injury occurred, at a greater rate of speed than four miles an hour when running backwards; that plaintiff's said train of cars, with the locomotive engine attached thereto, was run backward at the time and place of said alleged grievance, within the limits of said city of Montgomery, at a greater rate



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of speed than four miles per hour; that said train consisted of a large number of cars, to-wit, eighteen or more cars; and no proper and sufficient provision was made for giving signals to the engineer in charge, in case of damage; and that said train was not a regular train, running on definite and schedule time, but was drawn by what is commonly called a switch engine, running at irregular and uncertain times; and that said side-track was made by plaintiff in an unskillful and improper manner; by reason of all which said negligence of plaintiff, said alleged injury was caused, and said negligence of plaintiff contributed to cause said injury, and but for said negligence of plaintiff the alleged injury would not have occurred." The court overruled a demurrer to this special plea, and issue was then joined on it, as also on the plea of not guilty. The Montgomery Gas-Light Company also filed another special plea, alleging that the injury complained of was done by the servants of Chambers & Abercrombie, over whom it had no control; but a demurrer was sustained to this plea, and it requires no special mention.

The bill of exceptions purports to set out all the evidence adduced on the trial, and contains the following (with other) statements: "The evidence introduced by defendants tended to show that the empty car was not at first near enough to come in contact with plaintiff's train, but that the jar of the train caused the brick, which had been placed in front of the wheels of the first car, to fall off, and that car to roll up so as to come in contact with plaintiff's train; and that the front car of the train passed without coming in contact with the cars on the side-track. The evidence further tended to show that the persons employed by Chambers & Abercrombie to unload said cars had unloaded them on the side-track, and pushed them back so near the main track as to cause plaintiff's train of cars to be driven against them; but there was conflict in the evidence upon said latter fact. The evidence tended to show, also, that the plaintiff was guilty of negligence, which contributed proximately to causing said injury. The evidence further tended to show that, at the time of the injury, the plaintiff's said train of cars was backing at a greater rate of speed than four miles an hour; but the plaintiff's evidence tended to show that the speed was not greater than four miles an hour. It was admitted that there was an ordinance of the city of Montgomery, in force at that time, prohibiting the backing of plaintiff's trains at that point at a greater rate of speed than four miles an hour. The plaintiff's evidence tended to show, also, that the act of the defendants in placing said cars on said side-track so near to the main track caused the plaintiff's said train of cars to be driven against the cars on the side-track;

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and thereby to be thrown from said main track, and to be crushed and broken to pieces. Col. C. P. Ball, a witness for defendants, who had had many years of practical experience as a railroad engineer, testified that it was a very difficult thing, even for an experienced and practical railroad man, to tell with the eye the point on a side-track at which a car might be placed thereon, without danger of its coming in contact with passing trains; that accidents of this kind, as a result, had been of frequent occurrence, and, in order to prevent them, it had become the custom of railroads which he had managed, and of others which he had noticed in this particular, before the occurrence of this accident, to place a clearing-post, as it is called, on the side of such side-tracks at the point beyond which cars could not be placed without danger; and that this custom had become pretty general. The evidence showed, also, that no such clearing-post had been placed upon the side-track in question in this case."

The court charged the jury, at the instance of the Montgomery Gas-Light Company, among other things as follows: "(7.) If the jury believe, from the evidence, that the person or persons by whose fault or negligence the injury complained of occurred, were not the servants or agents of this defendant, nor subject to its control or authority, then the plaintiff can not recover against this defendant in this action." To this charge the plaintiff objected.

The court also gave the following (with other) charges, at the instance of Chambers & Abercrombie. (2.) "The defendants in this case are not liable for a mere mistake of judgment on the part of their employees or servants; but, before the jury can find for the plaintiff, they must find that the act of said employees, in putting the cars where they did, was a negligent act; that is, that such employees could have discovered, by the exercise of ordinary care, that the place at which they stopped the cars was a point at which the cars running on the main tract would be liable to strike them." (3.) "Negligence consists in the failure to exercise ordinary care; and if the jury believe, from the evidence, that the mistake made by the defendants or their employees, in placing the cars near enough to the main track to be struck by the plaintiff's passing train, was such a mistake as a prudent man, exercising ordinary care, was liable to make, then it was not such negligence as makes the defendants liable for the injury done." To each of these charges the plaintiff duly excepted.

The adverse rulings of the court on the pleadings, and the several charges given to which the plaintiff excepted, are now assigned as error.

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ARRINGTON & GRAHAM, and WATTS & SON, for appellant, cited Stephen's Pleading, 89, 157; Beach on Contr. Negligence, pp. 7, 9, 14, 25, 29, 34; Cooley on Torts, 70; *Sullivan v. Bridge Co.*, 9 Bush, Ky. 81; *Willey v. Belfast*, 61 Me. 569; *Clark v. Lebanon*, 63 Me. 393; *Steele v. Burkhardt*, 104 Mass. 59; 6 Amer. Rep. 91; *Baker v. Portland*, 58 Maine, 199; 4 Amer. Rep. 274; *City Council v. Wright*, 72 Ala. 411; Amer. Law Review, vol. 5, p. 41.

W. S. THORINGTON, *contra*, cited *Bethea v. Taylor*, 3 Stew. 482; *Northern C. Railroad Co. v. State*, 31 Md. 357; *Ala. Gr. So. Railroad Co. v. Hawkes*, 72 Ala. 112; *Gothard v. Railroad Co.*, 67 Ala. 114; *Potter v. C. & N. Railroad Co.*, 21 Wisc. 372; *Penn. R. R. Co. v. Roney*, 89 Indiana, 455; 2 Thomp. Neg. 1146, § 1; Beach, Contr. Neg. § 26; *Railroad Co. v. Williams*, 65 Ala. 74; *Railroad Co. v. Bayliss*, 74 Ala. 150; *B. & O. Railroad Co. v. State*, 29 Md. 252, 261; 42 Ill. 288; 38 Barb. 653; 59 Me. 520; *Baker v. Pope*, 9 Ala. 161.

STONE, C. J.—In *Thompson v. Duncan*, 76 Ala. 334, we held that contributory negligence is a defense, the proof of which rests on the defendant. The plaintiff need not anticipate and negative its existence. And if he aver that the injury he complains of was caused by the negligence of the defendant, without any fault or neglect of duty on his part, this does not change the burden of proof as to such contributory negligence. The defendant must still make the proof, unless plaintiff's testimony proves also that he, plaintiff, by his own negligence, has contributed proximately to the injury.

It is contended for appellees, Chambers & Abercrombie, that we need not consider the correctness of the court's ruling on the plaintiff's demurrer to their second plea; that whether their said plea was sufficient as a plea of contributory negligence, is immaterial, as that defense could be as well made under the general issue. It is not necessary we should decide this question.—Code of 1876, § 2988; *Petty v. Dill*, 53 Ala. 631; *Trammell v. Hudmon*, 56 Ala. 235; *Slaughter v. Swift*, 67 Ala. 494; *Burns v. Campbell*, 71 Ala. 271, 294. The principle invoked is applied, and rightly applied, where a demurrer has been improperly sustained to a special plea that is sufficient in law, and yet the record affirmatively shows that, under the general issue, the defendant could and did obtain the benefit of the defense he sought to set up by his special plea. In such case, if there is error, it is without injury.—*Phoenix Ins. Co. v. Moog*, 78 Ala. 284. The question is very different in such a case as this. Overruling the demurrer, was a judicial determination that the plea was sufficient. Plaintiff was thereby



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left without discretion. He must go out of court, under the ruling on the demurrer, or he must take issue on the plea. Taking issue upon it, he stakes the fate of his case on its truth or falsity; and if the jury find the averments of the plea to be proved, the defendant is entitled to a verdict, whether the plea be good or not.—*Mudge v. Treat*, 57 Ala. 1; *Betancourt v. Eberlin*, 71 Ala. 461. It results, that if the jury found the plea to be true as averred, the defendants were entitled to a verdict, and the only redress open to plaintiffs is to have a review of the ruling on the demurrer.

We will not consider the general doctrine of contributory negligence. In the recent case of *The Woodward Iron Co. v. Jones*, at the present term, and the cases therein cited, the doctrine is so fully discussed, that we deem it unnecessary to add anything to it. What we shall have to say will be confined to tendencies of the testimony in this cause. The record affirms it contains the substance of all the testimony given on the trial.

There are two important inquiries presented by this record, upon which the testimony is not agreed. The first is, the speed at which the train was moving at the time of the collision—whether at a greater rate than four miles per hour. The second inquiry is, at what point on the side-track the hands engaged in unloading the cars had left the empty ones; whether so near the main track, as that a passing train would strike them. This last inquiry is dependent on another. There is some testimony tending to show that the empty cars, as placed by the unloading hands, were too near the main track to allow a train to pass without striking them. Other testimony tended to show that they were not so placed, but, being put in motion by a passing train, they rolled of their own unchecked gravitation down the track—at that place a downgrade—and thus collided with the passing train. All these inquiries depend on conflicting oral testimony, and are questions for the jury. If the empty cars, when the train was approaching, were so near the main track as not to allow the train to pass clear of them, then the question of the speed at which it was moving, and of its having a watchman so stationed as that he could look ahead, and see and give notice of obstructions, will become material. If this be found to be the state of the case, and if the jury shall find that moving at the rate of not exceeding four miles an hour, and having a watchman so stationed as to see and give notice, the collision might have been averted by the use of reasonable diligence, then the railroad was guilty of contributory negligence, if the train was in fact moving at a greater rate of speed, and without such appointments, one or both. These conditions, if found to exist, will make good the defense

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of contributory negligence; for no action lies for an accidental injury, which could have been averted by the exercise of reasonable diligence. These are the rules for determining this case, if the empty cars were placed too near the main track to admit of free passage.

There is, however, another possible phase of the facts. There is some testimony tending to show the empty cars were placed not too near the main track, but, being insecurely fastened or scotched, the passing train put them in motion; and rolling down near the switch, the collision ensued. If these be the facts, the railroad company, it would seem, stands acquitted of proximate contributory negligence; for no amount of reasonable diligence could have foreseen or averted such catastrophe.

The question then would be, whether there was negligence in placing, fastening or scotching the empty cars. If there was, plaintiff would seem to be entitled to recover; and it is not perceived that the speed of the moving train would be a factor in this alternate aspect of the case. We may add that, according to the testimony in this cause, both the Gas-Light Company and Chambers & Abercrombie are liable for any negligence that may have been committed in placing the empty cars, if there was such negligence. Negligence of the servant, committed while performing a service within the scope of his authority, by which another is injured, renders the master liable.—Wood's Mas. & Serv. 536, § 279; Shear. & Red. on Neg. § 115.

To the second plea of defendants, Chambers & Abercrombie, there was a demurrer, which the Circuit Court overruled. The *gravamen* of the defense set up in that plea is contributory negligence. In the ninth assigned cause of demurrer is the language, "the acts alleged in said plea are not shown to have been the proximate cause of the injury complained of." The plea sets up several alleged omissions of duty by the railroad company—running backwards at a greater rate of speed than four miles an hour—no proper and sufficient provision for giving signals to the engineer in case of danger—and adds, "that said side-track was made by plaintiff in an unskillful and improper manner." This last averment is made a very important factor in the make-up of the plea, and yet it is what in law is generally a question of remote, in contradistinction to proximate contributory negligence.—*S. & N. Ala. Railroad Co. v. Williams*, 65 Ala. 74. The plea concludes: "By reason of all which said negligence of plaintiff, the said alleged injury was caused, and said negligence of plaintiff contributed to cause said injury; and but for said negligence of plaintiff, the alleged injury would not have occurred." In Beach on Contr. Neg. 7, § 3, it is said: "Contributory negligence, in its

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legal signification, is such an act of omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the act of defendant, is a proximate cause or occasion of the injury complained of."—*Thompson v. Duncan*, 76 Ala. 334. The demurrer to this plea ought to have been sustained.

The second and third charges given at the instance of Chambers & Abercrombie present substantially the same question, and we will consider them together. We do not doubt that, in many cases, if ordinary care be exercised, an honest mistake will be held to entail no liability on him who makes it. But charges must be interpreted in reference to the issue involved, and the testimony in the cause. In this case, the authority was to place the cars at some convenient point near the switch, so as to be accessible when it should become desirable to remove them, but not to place them so near that they would obstruct transit on the main track. All men know that a side-track approaches the main track by an acute angle, until they become one at the switch. All men know that cars are broader than the iron track of the road on which they run. Hence, all men know that the cars extend beyond the rail on either side. All men must know that to allow one train or car to pass another on parallel tracks, the interval between the tracks must be double the projection of the car beyond the rail, with a margin for contingencies. The commonest knowledge can not fail to comprehend each of these axiomatic and mathematical truths. The commonest prudence, in such service as was required here, will dictate that, if error be committed, it should be on the safe side, and would suggest the placing of a stationary car so far from the switch as to be beyond the point of possible danger. Mistakes, in such a service as the one we have in hand, constitute no answer for a claim for actual damages. As well might a trespasser claim exemption, when he goes by mistake across an unmarked line, and cuts timber from his neighbor's freehold.—See *Cooley on Torts*, 396; 2 *Whar. Ev.* § 1028; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Jackson v. Smith*, 75 Ala. 97. These charges should not have been given.

We discover no error in the other rulings.

Reversed and remanded.

CLOPTON, J., not sitting.



## Clark v. Zeigler.

### *Action for Breach of Covenant of Warranty to Land.*

1. *Measure of damages for breach of covenant, or warranty of title.*—In ordinary cases, the measure of damages which the purchaser is entitled to recover, on account of a breach of covenant of seizin, or warranty of title, is the purchase-money paid, with interest and costs of suit; but this rule does not apply to a sale of chattels, nor to cases of fraud, nor to a breach of covenant by a lessor to put the lessee in possession.

2. *Same, in case of incumbrance.*—When there is no failure of title to any part of the land, but an incumbrance on a portion of the tract, created by a prior conveyance of the right to enter and cut all the "saw-timber," the measure of damages is the diminished value of the entire tract, not exceeding the entire purchase-money paid, with interest.

3. *Value of trees cut, as proof of diminished value of land.*—In such action, the value of the trees cut under this prior license would be competent evidence, as relevant to the inquiry as to the value of such license, "because this would largely govern the extent of the diminution in value of the land;" but the value of the trees cut would not necessarily be the same as the diminished value of the land.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Henry S. Zeigler, against Henry C. Clark, to recover damages for a breach of the covenants of warranty contained in a deed to a tract of land, which said Clark had sold and conveyed to the plaintiff; and was commenced on the 25th October, 1884. Clark's deed to the plaintiff, which was dated October 10th, 1883, and recited the payment of \$400 as its consideration, conveyed a tract of land containing 320 acres, using the words "grant, bargain and sell," and containing a clause in these words: "And I, the said H. W. Clark, do covenant with the said Zeigler to warrant and defend the same against the claims and demands of all persons." On the 6th December, 1880, Clark had sold and conveyed by deed to one W. W. Wadsworth, in consideration of \$1,250 in hand paid, "all the saw-timber" on a large tract of land, embracing forty acres of the tract afterwards sold to Zeigler, giving him the right to enter, and allowing him three years within which to cut and remove the timber; and Wadsworth entered under this license, and cut and removed about 320 trees, after the sale to Clark. The plaintiff, testifying as a witness for himself, stated that the trees cut were worth one dollar each; that the forty acres of land was worth, before the trees were cut from it, about \$2.50 per acre, and not worth

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25 cents per acre after the trees were cut; and other witnesses introduced by him testified, that the land was worth about one dollar per acre, and the trees about 50 cents each. The defendant objected to the admission of the evidence as to the number and value of the trees cut, and excepted to the overruling of his objections.

The court charged the jury, among other things, "that if the time within which Wadsworth was to remove the timber had not expired at the time of the execution of defendant's deed to plaintiff, then there was a breach of the warranty contained in the plaintiff's deed, and he would be entitled to recover; that it was for them to say what damages he was entitled to recover, but in no event could the damages exceed the purchase-money for the whole tract; that in arriving at the damages to which the plaintiff was entitled, the jury could consider the difference between the value of the land from which the timber was cut, before the timber was cut, and its value afterwards, and the difference between these values, with interest, would be the damages he was entitled to recover, provided it did not exceed the entire purchase-money; that in estimating the difference in value, they were not to consider the value of the trees cut; that the difference in the value of the land at the two times was the measure of the plaintiff's recovery." And the court further charged the jury, on the request of the plaintiff, "that if the proof showed a breach of the warranty contained in Clark's deed to Zeigler, then plaintiff is entitled to recover the amount of injury he has sustained by that breach;" also, "that if there was a breach of said warranty, and Wadsworth cut timber from the land after the date of Clark's deed to Zeigler, then the plaintiff was entitled to recover the value of such timber trees so cut, provided it did not exceed the whole purchase-money of the land."

The defendant duly excepted to each of these charges as given, and also to the refusal of the following charges, which were asked by him in writing: (1.) "In case of a failure of title to a part of the land conveyed, the measure of damages is the proportionate value of that part as compared with the whole tract." (2.) "There is no failure of title shown, except as to the timber standing on the 40 acres; and the damages can not exceed the value of the timber cut and removed by Wadsworth, as compared with the value of the whole land, and the value of the whole land." (3.) "In considering the value of the land, the consideration paid by Zeigler to Clark is to be taken by the jury as the value." (4.) "The measure of damages for the breach of covenant against incumbrances can not exceed the amount of the incumbrance, provided the incumbrance is less than the consideration paid; and in no case

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can the damages exceed the purchase-money, with interest." (5.) "The measure of damages, on breaches of covenants of warranty in the sales of personal property, does not apply to real property; but, in these cases, the measure of damages for a breach of covenant of warranty can not exceed the amount of the purchase-money, with interest." (6.) "The measure of damages for a breach of warranty of title to real estate, either by failure of title to a part thereof, or because of incumbrance, is that part of the purchase-price which bears to the whole the same proportion that the value of the part of the estate, as to which the title has failed, or the amount of the incumbrance, bears to the value of the whole estate, if the estate exceeds in value the purchase-price."

The admission of the evidence objected to, the charges given, and the refusal of the charges asked, are now assigned as error.

TROY, TOMPKINS & LONDON, for the appellant, cited Sedgwick on Measure of Damages, 170-71; 2 South. Damages, 276-78; *Morris v. Phelps*, 5 John. 49; *Ela v. Card*, 2 N. H. 175, or 9 Amer. Dec. 46; *Cushman v. Blanchard*, 2 Greenl. 266, or 11 Amer. Dec. 76; *Bibb v. Freeman*, 59 Ala. 612; *Kingsbury v. Milner*, 69 Ala. 502.

WATTS & SON, *contra*, cited *Cathcart v. Bowman*, 5 Penn. St. 217; *Sparr v. Andrew*, 6 Allen, 420; *Knowles v. Sharp*, 36 Iowa, 232; *Willis v. Dudley*, 10 Ala. 933; *King's Adm'r v. Reynolds*, at the present term.

SOMERVILLE, J.—The question for decision is as to the correct rule for the measure of damages in an action on a covenant of warranty, when only a certain portion of the land covered by the warranty is subject to incumbrance. In October, 1883, the defendant, Clark, conveyed to the plaintiff, Zeigler, three hundred and twenty acres of land, with warranty of title. At the time of this conveyance, forty acres of the tract were subject to an incumbrance which defendant had created, several years previous, in favor of Wadsworth, by conveying to him the right to enter and cut all of the "saw-timber" on this particular forty acres. Under this license, Wadsworth entered, and cut over three hundred trees, while the plaintiff was in possession, and against his objection.

If there had been a failure of title to the whole tract of three hundred and twenty acres, resulting in an eviction of the vendee, who is here the plaintiff, the measure of damages, in an action based on the broken covenant of warranty, would be the purchase-money, or original consideration, with interest



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and the costs of the ejectment suit added.—*Kingsbury v. Milner*, 69 Ala. 502. Our decisions, like those of many of the other States, have made no distinction between covenants of seizin, or of title, and covenants of warranty—the rule in each being the same.—*Bibb v. Freeman*, 59 Ala. 612. In some States, the measure of damages has been held to be the value of the land at the time of the conveyance, with interest, whether this sum be either more or less than the actual purchase-money; and in others, the full value at the time of eviction, whatever may have been its appreciation or depreciation. The weight of authority is conceived to be favorable to the rule adopted in our more recent decisions, limiting, in ordinary cases, the right of recovery to the purchase-money, with interest and the costs of suit.—2 Greenl. Ev. § 264; 2 Parsons Contr. 225, *note* (n). The justice of this rule seems to consist in the protection afforded the covenantor against any rapid increase in value of the lands, by reason of the discovery of mineral wealth, or from other accidental causes, and the loss he might sustain, amounting in many instances to absolute ruin, by the erection of expensive improvements by the vendee on the purchased premises. Its injustice consists in the fact, that it fails frequently to indemnify the covenantee against the actual damages which he has sustained by the breach of covenant, and following as the apparent natural and proximate consequence.

For the latter reason, the courts have seen fit to limit the principle, so as to make it applicable only to real estate, and not to the sale of chattels. In some instances, and with much reason, cases have been excepted from its operation, where the vendor has acted with fraud, or in bad faith, or even knew that he had no title at the time of his sale, or agreement to sell; a distinction being made between his inability to make a good title, and his sheer refusal.—2 Add. Contr. (Morgan's Ed.) § 529; 3 Parsons Contr. 230; *Pinkston v. Huie*, 9 Ala. 252. In *Snodgrass v. Reynolds*, decided at the present term, we declined to apply this general rule, in an action by a lessee against a lessor for breach of covenant to put the plaintiff in possession, the measure of recovery in such case being held to be the value of the lease or term.

Here, however, there is no failure of title to the whole tract, which was the subject of sale, and no eviction of the vendee as to any portion of it. There is only a partial defect of title as to forty acres, or about one-eighth fractional part of the whole. It is well settled, where there is an entire failure of title as to any fractional part of a tract sold, the recovery for this defect will be in proportion to the *value* of this part, and not to its mere area or quantity. As said by Chancellor KENT,

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in *Morris v. Phelps*, 5 Johns. 49, "the law will apportion the damages to the measure of value between the land lost and the land preserved." In ascertaining such proportion, it was held in *Bibb v. Freeman*, 59 Ala. 612, 619, that the whole tract should be rated at its cost value—the original purchase-money. The calculation would be an easy one of arithmetical proportion. The damages for an entire failure of title to forty acres, of a tract of three hundred and twenty acres, for example, would be an amount which would bear the same arithmetical proportion towards the purchase-money, as the real value of the forty acres would to the real value of the entire tract of three hundred and twenty acres.

The principle is not of easy or convenient application, where there is a mere incumbrance on a part of the land, without failure of title *in toto* as to such part. The purpose of all damages, not exemplary or punitive, is compensation, or recompense, for the injury actually suffered by the plaintiff. The damage here suffered, and for which a recovery should be allowed, is the diminished value of the whole tract of land, the title of which the defendant warranted, by reason of the incumbrance; or, in other words, the difference between the value of the whole tract, if the title were good, and its value as depreciated by the incumbrance. This rule had been recognized as far back as *Gray v. Briscoe*, Noy's R. 142, where a copyhold estate had been sold as a freehold, with a covenant that the vendor was seized in fee. The measure of damages, on suit by the covenantee, was held to be the difference between the value of a freehold and a copyhold estate. So, in *Bronson v. Coffin*, 108 Mass. 175 (s. c., 11 Amer. Rep. 335), where land was incumbered by a perpetual obligation, in the nature of an easement, by which the owner was always to maintain a fence adjacent to a railroad running through his farm, the proper measure of damages for breach of covenant against incumbrances was held to be a just compensation for the real injury resulting from such incumbrance, estimated by the difference in the fair market value of the estate by reason of the existence of such defect of title. A sufficient protection is afforded the vendor, by restricting the amount of damages allowed to be recovered to the entire purchase-money, with interest. We readily perceive, that a strong argument can be made in favor of the view, that the recovery ought to be limited to the amount which would have been recovered, if the entire title of the incumbered portion had failed; for it would seem, in this case, that the plaintiff ought not to recover more damages for the sale by the defendant of the timber on the forty acres, than he would for the sale of the fee-simple interest in it. So, on the other hand, it could be urged

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with equal force, that the damage would be the same, ordinarily, whether the trees were cut from a part of the land, or miscellaneously from all parts, provided the number and kind of trees cut were in each case the same. Making choice between two difficulties, we prefer to adopt the simpler and more convenient rule, which, as we have said, is to compensate the plaintiff for the estimated diminution in value of his entire tract of land, by reason of the incumbrance, from the time of the breach of covenant, with interest and costs of suit, not, however, to exceed the purchase-money paid for the whole tract, with interest. If the grantee had paid off, or rather purchased in this incumbrance, he would have been entitled to recover of the grantor what he had reasonably expended in thus discharging it, at least to an amount not exceeding the purchase or consideration money and interest.—3 Parsons Contr. 228, note (u); 4 Kent's Com. 476; *Dimmick v. Lockwood*, 10 Wend. 142. And this sum would seem to be a close approximation, if not a just measure of the diminished value of the premises, because it was the cost of making the title what it would have been had there been no incumbrance.

The value of the trees cut would be admissible in evidence, as relevant to the inquiry as to what was the value of the license conferred on Wadsworth, because this would largely govern the extent of the diminution in value of the land. But the value of these trees would not necessarily be the same as the diminished value. Cases may be supposed where the clearing of land by cutting trees from it would appreciate its value, the labor of clearing fully setting off the value of the timber.

It is manifest that the rulings of the court below conflicted with these principles, and the judgment must be reversed, and the cause remanded.

## Bibb v. Hunter.

### *Bill in Equity to establish Trust in Lands.*

1. *Express trust in lands; how created.*—An express trust in lands, resting on an agreement between the parties, can only be created or declared by an instrument in writing, signed by the party creating or declaring it (Code, § 2199), though no particular form of words is necessary; and while an assessment list for taxation, signed by the holder of the legal title, may be an admission on his part that he holds for the benefit of another, it can not operate as the creation or declaration of a trust in any part of the land, within the meaning of the statute.



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2. *Resulting trust arising from payment of purchase-money.*—To establish a resulting trust in lands, in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must be shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase-money, if money was paid, or other thing of value which constituted the consideration, or that the credit (if credit was given) was extended to him.

3. *Same; burden of proof; admissions of grantee.*—The presumption being that the conveyance speaks the truth, the *onus* is on the party who seeks to establish a resulting trust in the lands, to overcome this presumption by evidence full, clear and satisfactory; and the verbal admissions or declarations of the grantee, while admissible as evidence against him, are not sufficient, unless plain and consistent with themselves, or corroborated by circumstances.

4. *Same; testimony of complainant, as to transactions with deceased grantee.*—When a conveyance is taken to the grantee for life, with remainder to certain grandchildren by name, and another grandchild files a bill to establish a resulting trust in his own favor, on account of moneys advanced by him to make the purchase, the complainant may testify to transactions between himself and the deceased grantee (Code, § 3058); but, the bill not being filed until after the death of the grantee, that fact must be considered in weighing such testimony, and renders more stringent the necessity for corroborating circumstances.

5. *Resulting trust in part of lands purchased; variance.*—If the complainant's notes were given, at the time of the original transaction, for the deferred payments of purchase-money, while the cash payment was made by the grantee with his own funds, a resulting trust may be declared in a corresponding aliquot part of the land, although the notes were paid at maturity by the grantee himself; but this relief can not be granted, under a bill which alleges the payment of the entire purchase-money by the complainant, and claims a resulting trust in the entire tract of land.

APPEAL from the City Court of Montgomery, in equity.

Heard before the Hon. THOS. N. ARRINGTON.

The bill in this case was filed on the 5th November, 1884, by Harry Hunter, against Frank Bibb and Harison Bibb, of whom the former was a minor; and sought to establish a trust, in favor of the complainant, in a tract of land containing one hundred and sixty acres, the legal title to which was in the defendants. The land consisted of two eighty-acre parcels, which, together with another eighty-acre parcel, had belonged to the estate of Thos. M. Cowles, deceased; and it was bought in November, 1878, from J. T. Holtzelaw, executor and trustee of the estate, by Edmund Harrison, who was the grandfather of the complainant, and also of the defendants. The agreed price was \$1,200, of which \$400 was paid in cash; and for the residue, the complainant executed his two promissory notes to said Holtzelaw, payable in one and two years. A bond for titles was executed by Holtzelaw to Harrison, which was not produced in evidence, but which, according to the testimony of the witnesses, was conditioned to make titles to the land to said Harrison, or to any other person by his direction, on pay-

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ment of the two notes. The notes were not paid at maturity, as Holtzelaw testified, but were paid by Harrison in the latter part of the year 1880; and about one year afterwards, at the instance of Harrison, and on his production of the title-bond, Holtzelaw conveyed eighty acres of the land (not involved in this suit) to Josiah Morris, and the residue to said Harrison for life, with remainder at his death to the defendants. This deed is nowhere set out in the record, but there seems to have been no dispute as to its terms.

The complainant claimed, and alleged in his bill, that Harrison made the purchase as his agent, and for his benefit; that he advanced to Harrison the \$400 used in making the cash payment, and gave his notes for the deferred payments; that he afterwards delivered to Harrison \$160, to be applied in partial payment of the notes, and instructed him to apply \$100 additional, out of wages due to complainant for services rendered; and that the balance of the purchase-money, as evidenced by the notes, was paid by Harrison, by agreement between them, out of the rents collected for the lands, of which Harrison had the possession and control. An answer to the bill was filed by the defendants, denying all its material allegations; and they further insisted, by way of plea, that the alleged agreement between Harrison and the complainant, if ever made at all, rested only in parol, and was void under the statute of frauds.

The complainant's own deposition was taken in his behalf, in which he testified to the facts substantially as stated in the bill. Objections were filed by the defendants to several portions of his testimony, in which he stated declarations by Harrison, and referred to transactions between Harrison and himself; but the record does not show that the court acted on them. The complainant also took the depositions of J. T. Holtzelaw and J. H. Clisby. Holtzelaw testified, that the contract of purchase was made by Harrison, who also paid the \$400 cash, while complainant's two notes were taken for the deferred payments; that Harrison said, at the time, "that he was buying the land for his grandson, Harry Hunter;" that the notes were finally paid by Harrison in the fall of 1880, and "he (witness) then offered to make a deed to Hunter, but Harrison declined to receive it, saying that he had changed his mind about giving it to Hunter;" and that the deeds were afterwards executed as above stated, at the instance and request of Harrison. He further testified as follows: "Hunter claimed that he had given Harrison the money to make the advance payment. Harrison claimed that he was making the purchase in Hunter's name, on account of some judgments that were against himself, but said that he expected to give it to Hunter. I never saw them together, either at the trade or afterwards, in reference to the

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matter." Clisby, in whose employment Hunter was during the years 1879-80, thus testified: "Col. Harrison stated to me, that he had purchased a piece of land from the trustee of the Cowles estate, which he was going to give to Harry Hunter; that he used \$400 of Harry's money towards the payment of it. He drew up the deed to Harry Hunter at my desk, and always spoke of the land as Hunter's. . . . When the last payment on the land was due, he asked me to lend him the money to finish paying for it, and said that he had given his deed for 120 acres of the land to Harry, who could execute his mortgage to me, which would be ample security. After I declined to let him have the money, he asked to hold back a sufficient amount of Hunter's monthly salary to meet the last payment on the land; which I also declined to do." The complainant also offered in evidence the assessment returned for the years 1879 and 1880, showing that the land in controversy was returned as the property of Harry Hunter, by Edmund Harrison as his agent. It was admitted, that A. H. Moses and C. Vaughan would swear that the \$400, said by the complainant to have been paid by him to Harrison in Vaughan's presence, was paid in March, 1881.

On final hearing, on pleadings and proof, a decree was rendered for the complainant; and this decree is now assigned as error by the defendants. There are also numerous assignments of error based on the refusal of the court to sustain the defendant's objections to testimony.

WATTS & SON, for appellant.—(1.) The complainant was not a competent witness to prove any transaction between himself and Harrison, or any declarations by Harrison. He is within the spirit, if not within the letter of the statute, and it is liberally construed.—*Boykin v. Smith*, 65 Ala. 299; *Preston v. McMillan*, 58 Ala. 84; *Key v. Jones*, 52 Ala. 247; *Bellah v. Stuckey*, 41 Ala. 700; *Kumpe v. Coons*, 63 Ala. 448; *Insurance Co. v. Sledge*, 62 Ala. 566; *Dismukes v. Tolston*, 67 Ala. 388; *Fort v. Davis*, 67 Ala. 485; *Asay v. Hoover*, 5 Penn. St. 21; *Killen v. Lide*, 65 Ala. 506; *Drew v. Simmons*, 56 Ala. 465. (2.) There is a fatal variance between the allegations and the proof.—*Lehman v. Lewis*, 62 Ala. 129. (3.) A resulting trust does not arise, unless the money of the party asserting it went into the purchase of the land—was used at the time in paying the purchase-money; and neither the declarations of the party making the purchase, that he is buying for another, nor the subsequent repayment of the money to him, can change the principle.—*Sugden on Vendors*, vol. 3, p. 180; *Perry on Trusts*, §§ 135, 137; *Pinnock v. Clough*, 16 Vt. 507; *Botsford v. Burr*, 2 John. Ch. 408; *Leh-*  
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*man v. Lewis*, 62 Ala. 129; *Crutcher v. Taylor*, 66 Ala. 217; *Whaley v. Whaley*, 71 Ala. 159; *Kelly v. Karsner*, 72 Ala. 505; *Foster v. Atheneum*, 3 Ala. 309; *Taliaferro v. Taliaferro*, 6 Ala. 404; *Robinson v. Robinson*, 44 Ala. 227; *Steere v. Steere*, 5 John. Ch. 1; *Thompson v. Branch*, 33 Amer. Dec. 153; *Dudley v. Bosworth*, 51 Amer. Dec. 692; *Fowke v. Slaughter*, 13 Amer. Dec. 133; *Leman v. Whitley*, 4 Russ. 423; *Smith v. Burnham*, 3 Sumner, 435; *Neill v. Keese*, 5 Texas, 23; *Cowan v. Wheeler*, 43 Amer. Dec. 287. (4.) There is no express trust, nor declaration in writing of a trust.—Code, § 2199; *Cowan v. Wheeler*, 43 Amer. Dec. 283; *Thompson v. Branch*, 33 Amer. Dec. 153; *Seymour v. Delancey*, 3 Cow. 445; *Curlin v. Hendricks*, 35 Texas, 225; *Anderson v. Greene*, 7 J. J. Mar. 448.

RICE & WILEY, and SMITH, McDONALD & MARKS, *contra*. The bill seeks to establish and enforce both an express trust and a resulting trust in the lands, and the evidence sustains each feature of the bill. (1.) As evidence of an express trust created by the agreement of the parties, and taken out of the statute of frauds by writings signed by the parties, the complainant shows his notes to Holtzclaw for the deferred payments of the original purchase-money; the bond for title, conditioned to make title, not to Harrison, but to such persons as he “may direct”; and the tax-list signed and sworn to by Harrison, acknowledging that he held the lands for Hunter. That these writings are sufficient to take the case out of the statute of frauds, see Perry on Trusts, § 82; Browne on Statute of Frauds, 94, and authorities cited; *Denton v. McKenzie*, 1 Amer. Dec. 654; *Lehman v. Lewis*, 62 Ala. 134. (2.) To raise a resulting trust, it must be shown that the money of the party asserting it was used in the original purchase, or that the credit was given to him, and that he has paid the money. The purchase is consummated when the deed is executed and delivered.—2 Johns. 198; 3 Cowen, 299. No payments made after the delivery and acceptance of the deed can be allowed to change its legal effect, but the antecedent transactions and declarations of the parties may be inquired into.—*Lehman v. Lewis*, 62 Ala. 129; *Botsford v. Burr*, 2 John. Ch. 405. That Harrison represented to Holtzclaw that he was buying for Hunter, and that Hunter’s notes were given for the deferred payments, are undisputed facts. If Harrison used his own money in making the cash payment, he advanced it as the friend or agent of Hunter, taking the title to himself as security, and has been fully repaid; and the defendants as volunteers, succeeding only to his rights, will be compelled to convey as he would have been.—Perry on Trusts, § 113; *Lehman v. Lewis*, 62 Ala. 129; *Rothwell v.*

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*De Witt*, 2 Black, U. S. 613. That the defendants can not set up the statute of frauds, see *Cooper v. Hornsby*, 71 Ala. 62.

CLOPTON, J.—Section 2199 of the Code declares: “No trust concerning lands, except such as results by implication, or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same, or his agent or attorney, lawfully authorized thereto in writing.” The trusts, not included in the statute, are implied trusts—resulting, or constructive—such as spring out of the facts of the transaction, independent and exclusive of any agreement between the parties. Whenever the trust rests on an agreement, it must be created or declared by instrument in writing, *signed* by the party creating or declaring the same. *Patton v. Beecher*, 62 Ala. 579. No particular form or precise words are required. Any instrument in writing, signed by the party, at the time of its creation, or subsequently, manifesting the nature, subject-matter, and objects of the trust, with reasonable certainty, may suffice.

The record does not show that the alleged trust is manifested by any writing, *signed* by Harrison, such as the statute requires. While the lists of assessment for taxation, signed by him, may be regarded as admissions of the right of complainant to the portion of the lands contained therein, they do not purport to be the creation or declaration of a trust, either in the whole of the land claimed, or a portion thereof, and are insufficient to prevent the operation of the statute. We may, therefore, dismiss from further consideration the aspect of the case in which the title of complainant to relief is sought to be founded on an express trust.

A resulting trust rests on presumed intention, and is founded on the equitable principle, that the beneficial ownership follows the consideration. The trust results to the party from whom the consideration moves, before, or at the time of the purchase, or of the making of the conveyance. It results, no fiduciary relation existing between the parties, from the original transaction, and at the time it takes place. Generally, in the absence of circumstances showing a different intention or understanding, a trust arises, whenever the purchase-money of land is paid by one person, and the title taken in the name of another, whether the purchase is made by the advancer of the purchase-money personally, or by the grantee. Though a resulting trust arises, where an agent, on a parol undertaking, purchases land for the benefit, and pays for it with the money, of his principal, and takes a deed for it in his own name; if, nevertheless, in such case, the agent pays his own money for the land, not

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having any funds of the principal in hand, and not as a loan, a trust is not created, notwithstanding the principal may subsequently reimburse the agent the amount expended. In *Smith v. Burnham*, 2 Sumner R. 435, Judge STORY says: "I take it to be clear, upon principle, that if one person contracts by parol with another, that he will purchase an estate for the latter, he purchases the estate, and takes the conveyance in his own name, and pays for it out of his own money, and not out of that of the other party, that will not create a trust by implication of law in favor of the other party. The law, in such case, treats it as a parol contract to purchase and hold in trust for the benefit of another; and not as a trust arising from operation of law."—*Lehman v. Lewis*, 62 Ala. 129; *Fowke v. Slaughter*, 3 A. K. Marshall, 56.

The foundation of a resulting trust being the payment of the consideration price by the person claiming to be the beneficial owner, if the party who sets it up has made no payment, he can not show by parol evidence that the purchase was made on his account, or for his benefit. There must be in the transaction something more than the breach of a parol agreement. Actual payment of the consideration in *money* is not essential. Payment may be made in labor, property, securities, credit, or any thing of value. "The mode, time, and form, in which the consideration was rendered, are immaterial, provided they were in pursuance of the contract of purchase. It is sufficient, if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf, or upon her credit. The trust results from the purchase and payment of the consideration by or for one party, and the conveyance of land to another." *Blodgett v. Hildreth*, 103 Mass. 484; *Preston & Stetson v. McMillan*, 58 Ala. 84. The other essential facts existing, a trust will be decreed in favor of one who incurs an absolute obligation to pay the consideration, before or at the time of the conveyance, and as a part of the original contract of purchase. 2 Pom. Eq. Jur. § 1037.

The case made by the bill is, that complainant procured and authorized Harrison to purchase for him the lands in controversy; that, acting under such authority, Harrison, about November 10th, 1878, became the purchaser of the lands, for and in behalf of complainant, under a contract by which the purchase-money, being twelve hundred dollars, was to be paid, one third in cash, and the balance in equal payments at one and two years; that Harrison made the cash payment with money furnished him by complainant, and the complainant executed his two promissory notes for the deferred payments; that the vendor executed a bond, conditioned to make titles, on payment



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of the notes, to such person or persons as Harrison might direct, of the nature of which bond complainant was ignorant until a few months before the filing of the bill; that complainant furnished Harrison money, which he paid to the vendor, and took up the notes; that Harrison paid no part of the purchase-money, and procured from the vendor on November 8th, 1881, after the notes were paid, a deed conveying to him a life-estate in the lands, with remainder to the defendants, who paid no part of the purchase-money. The bill alleges facts, from which it is claimed a trust results, with sufficient preciseness and distinctness; and the inquiry must be addressed to the sufficiency of the evidence to sustain its allegations.

The sufficiency of the evidence must be tested by the application of well settled rules. The burden of removing the presumption, that the conveyance speaks the truth, rests on the complainant. Appreciating the danger of having deeds or other solemn writings displaced by parol evidence, easy of fabrication, and sometimes incapable of contradiction, the courts have generally upheld the rule, that the presumption arising from the conveyance must prevail, unless overcome by evidence full, clear, and satisfactory. While the verbal declarations or admissions of the grantee are admissible against him, they should be closely scrutinized; and, unless they are plain and consistent, or corroborated by circumstances, are regarded as insufficient basis for a decree establishing a trust—*Larkins v. Rhodes*, 5 Por. 195; *Lehman v. Lewis*, *supra*.

The only witness who testifies that complainant's money was used in paying for the lands, is complainant himself. Objections were made to his competency to testify to transactions with, or statements by Harrison, who is deceased. The statute—section 3058 of the Code—applies to all cases, and to those only, where a conflict of interest is involved between the party offered as a witness and the estate of a decedent, or between the witness and an adversary party to whom the decedent acted in a representative or fiduciary relation, and where the effect of the evidence tends to diminish the rights of the estate of the decedent, or of those claiming in succession under him, or of the other adversary party.—*Insurance Co. v. Sledge*, 62 Ala. 566; *Dismukes v. Tolston*, 67 Ala. 386. Harrison had only a life-interest in the property; his estate is not interested in the result of the suit—can neither gain nor lose thereby; the defendants do not claim in succession to him; and he was not acting, at the time of the statement or transaction, in any representative or fiduciary relation to them. The evidence does not fall within the exclusion of the statute. Whilst, therefore, in the consideration of the evidence, we shall consider the testimony of complainant, it must be weighed in view

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of the fact, that the claim was not set up until after the death of the nominal purchaser, and the resulting impossibility of contradicting it—the lips of the only person who could contradict it being sealed, beyond the power of the court to open—and of the consequent more stringent necessity of corroboration by circumstances.

The first question of fact is, with whose money was the cash payment made? Complainant states, that he delivered to Harrison, about 1878, four hundred dollars, with which to make the payment; that he received the money from the sale of some land in South Alabama, and that Vaughan, his brother-in-law, was present when he delivered the money to Harrison. The testimony of Moses and Vaughan shows, that the land in South Alabama, from the proceeds of which the four hundred dollars delivered in the presence of Vaughan were derived, was not sold until March, 1881, several years after the purchase of the lands in controversy was made, and some months after all the purchase-money had been paid. Holtzclaw, the vendor, testifies that the cash payment was made by crediting the amount on an acceptance of his held and owned by Harrison. It is evident that these witnesses are mistaken, or the complainant is mistaken as to the time he delivered the money to Harrison. It may be, that the four hundred dollars delivered to Harrison in March, 1881, was intended to refund the first payment, which had been made by him. The record does not disclose or indicate any other purpose or reason, unless it be the amount paid by Harrison on the notes for the deferred payments. But there is no pretense, and the bill negatives the inference, that the payment was made by Harrison as a loan. No subsequent conduct, dealing, agreement or payment, disconnected from the original transaction, will raise a resulting trust.

The declaration of Harrison, that he was buying the land for complainant, qualified by his further declaration, that he was making the purchase in complainant's name on account of some judgments against himself, and that he expected to give it to complainant; and his declaration to Clisby, made under the circumstances, and for the purpose of raising money to pay the notes of complainant, are too unsatisfactory and inconsistent to be made the basis of a decree; especially when the facts, on which a resulting trust can be founded, are disproved by the other evidence. Neither a verbal declaration of the nominal purchaser, that he is buying for another, without proof that the purchase-money was paid by such other, nor an inchoate, incomplete, and unexecuted intention to give, will raise a resulting trust.

It may be conceded, there are declarations and admissions of

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Harrison, inconsistent with the theory that the lands were purchased on his own account, and for his own benefit, and which tend to show that he was purchasing them for complainant, by agreement, as his agent. On the other hand, we have the written admission of complainant, that he had no claim to certain land, which was included in the purchase, and Harrison's statement to complainant, that he would turn the land over to him as soon as he got the balance of the purchase-money out of it. The circumstances, declarations, and admissions may tend to prove that the lands were purchased by an agreement of some kind; but the true character of the transaction remains in uncertainty and confusion. It is not sufficient that the evidence generates doubt and uncertainty. The declaration of a trust, as claimed by the bill, involves a disregard of most salutary principles, and abrogates rules indispensable to the certainty and conservation of solemn and deliberate writings. The evidence is insufficient to authorize a decree of a trust in favor of complainant, to the extent of the entire lands.

The remaining inquiry is, can a trust be decreed in favor of complainant in a part of the lands? It is clear beyond question, that complainant executed his notes for the deferred payments, and thereby incurred, at the time of the purchase, and as a part of the original transaction, an absolute obligation to pay—in other words, that so much of the consideration moved from him. The money was sent from Mobile, and the services, for which Harrison was indebted, were rendered prior to the purchase of the lands. They constituted a debt due by Harrison, and were not furnished for the purpose of paying the notes, though there may have been a subsequent parol agreement, that the indebtedness should be so discharged. The notes, as the vendor testifies, were paid by Harrison, partly in money, and partly in orders drawn by the *cestuis que trust*, for whose benefit he sold the land. If a trust *pro tanto* was created in favor of complainant, at the time of the purchase, by incurring the absolute obligation to pay, the subsequent payment of the notes by Harrison, who had incurred no obligation to pay them, can not operate to remove or defeat such trust. Such payment only constituted him a creditor, with the right to reimbursement.

It has been said generally: "There can be no resulting trust of an estate to a particular extent of its value, leaving the residue of its value in the grantee;" that the beneficial ownership in the entire estate must exist—an unmixed trust of the ownership and title, and not a charge for the re-payment of an advance or other demand, nor an equity to a sum of money to be raised out of the lands. It was also said by Chancellor KENT,



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that a trust results *pro tanto*, where part of the purchase-money is paid by a third person, contemporaneously with the purchase; which statement of the rule has been in words adopted in many cases. A comparison of the authorities shows that these general statements may be harmonized, by being understood as subject to the qualification, that when a partial payment, *being a definite aliquot part of the consideration*, is made, a trust in a corresponding aliquot part of the land will result. But, unless the payment be of an aliquot part of the consideration—if the amount be indefinite or uncertain—no trust results by implication of law: “a general contribution of a sum of money towards the entire purchase is not sufficient.” 1 Smith’s Lead. Cases (4th Am. Ed.), 339; *Botsford v. Burr*, 2 Johns. Ch. 406; *White v. Carpenter*, 2 Paige, 217; *McGowan v. McGowan*, 14 Gray, 119. This rule must be understood as referring to simple resulting trusts, as distinguished from investments of trust funds by trustees, or other persons acting in a representative or fiduciary capacity. If, therefore, the notes of complainant were for an aliquot part of the whole consideration, a trust results *pro tanto*, and will be decreed, on a proper case, complainant having reimbursed, or on his reimbursing Harrison, the amount expended by him in paying the notes. As to this, the evidence is somewhat uncertain. It is unnecessary, however, to consider, whether the evidence brings the case within the operation of this rule, as such relief can not be granted on the bill as it now stands.

Reversed and remanded.

## Coltart v. Moore.

### *Statutory Action in nature of Ejectment.*

1. *Form and sufficiency of verdict.*—In a statutory action in the nature of ejectment, the suggestion of adverse possession and the erection of valuable improvements being found true, and the value of the improvements being assessed, or their excess above the rents (Code, §§ 2951–54), the verdict should go further, and assess the value of the lands without the improvements.

2. *Judgment on insufficient verdict; how corrected.*—Such verdict being defective, the court may set it aside during the term, and award a *venire de novo*; and a judgment rendered on it would be reversed on appeal.

3. *Same; waiver of irregularity.*—Judgment having been rendered on such defective verdict, but set aside, on motion, at a subsequent term, after which the cause was, for several terms, treated as a case pending and undecided; the irregularity, if any, in setting it aside, is waived, and the irregular order can not be vacated on motion, as a void judgment or order may be.

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APPEAL from the Circuit Court of Madison.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by Edward H. Moore and others, against Charles Reagan, to recover certain premises, particularly described in the complaint; and was commenced on the 5th April, 1876. Mrs. Harriet E. Coltart intervened as owner of the premises, and was admitted to defend; and she thereupon pleaded not guilty, and entered a suggestion of adverse possession for three years and the erection of valuable improvements. Issue was joined on his plea and suggestion, and a trial had at the December term, 1878, when the jury returned a verdict in these words: "We, the jury, find the issues in favor of the plaintiffs, and allow the defendants all the rents accrued, and \$774 over the rents for improvements; and that the suggestion of adverse possession for three years and improvements is true." On this verdict the court entered up judgment as follows: "It is therefore ordered by the court, that the plaintiffs have and recover judgment against the defendants, for the costs in this behalf expended, for which let execution issue." At the same term of the court, the defendant entered a motion for a new trial, and the motion was overruled at the next term, to which it had been regularly continued. At the June term, 1879, the plaintiffs entered a motion "to set aside the verdict, and to reinstate the cause upon the trial docket," on account of the insufficiency of the verdict; and at the same term, the court granted the motion, and set aside the judgment; "to which ruling," as the judgment-entry recites, "the defendant objects and excepts." The cause was afterwards continued for several terms, at which a lost complaint was substituted, the death of one of the plaintiffs suggested, the marriage of another, etc., until the February term, 1884, when the plaintiffs filed a petition and motion, asking to amend the original judgment, *nunc pro tunc*, "so as to show by reference and description the lands recovered by plaintiffs, and in other respects as may seem right and proper." On the hearing of this motion and petition, at a subsequent term, all the papers in the cause, the records and dockets, being before the court as evidence, the motion and petition was granted, and a judgment *nunc pro tunc* was rendered, as follows: "It is therefore considered and adjudged by the court, that the plaintiffs have and recover of the defendants the possession of the lands described in their complaint, as follows," describing them; "and it further appearing from the verdict of the jury that the suggestion of three years adverse possession and improvements is true, and that the value of the improvements exceeds the rents by \$774, it is ordered by the court, that no writ of possession issue for one year from this date; and it is

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further ordered, that the plaintiffs have and recover of the defendants the costs," etc.

The defendant duly excepted to this ruling and judgment, and here assigns the same as error.

D. D. SHELBY, and R. W. WALKER, for appellant.—The verdict of the jury was substantially defective, and no valid judgment for the plaintiff could be entered on it. The effect of the statute, when there is a suggestion of adverse possession and the erection of valuable improvements (Code, §§ 2952–54), is to require a special verdict, in which all the facts must be found, and which can not be aided by intendment.—Proffatt on Jury Trials, §§ 435–44; *Traun v. Wittick*, 27 Ala. 562; *Toulmin v. Lesesne*, 2 Ala. 359; *Clay v. State*, 43 Ala. 352; *Lee v. Campbell*, 4 Porter, 198; *Sewell v. Glidden*, 1 Ala. 52; *Moody v. Keener*, 7 Porter, 218; 2 Wheat. 221; 47 N. Y. 596. The bill of exceptions sets out all the evidence, and shows nothing which authorized the rendition or amendment of a judgment *nunc pro tunc*.—*Whorley v. M. & C. Railroad Co.*, 72 Ala. 20; *Buchanan v. Thomason*, 70 Ala. 401; *Kidd v. McMillan*, 21 Ala. 325; Freeman on Judgments, §§ 70, 90, 96; *Herring v. Cherry*, 75 Ala. 376; *Gray v. Brignadello*, 1 Wallace, 627; 18 Maine, 183; 45 Mo. 171. The judgment, as rendered *nunc pro tunc*, is erroneous, because the verdict had been set aside on the plaintiff's own motion; and because it does not direct the writ of possession to be held up for one year.—Code, § 2954.

JNO. D. BRANDON, O. R. HUNDLEY, and B. P. HUNT, *contra*. The original judgment was not void, though the verdict was informal, since the court had jurisdiction of the subject-matter and of the parties; and not being void, the court had no authority to set it aside at a subsequent term.—*Buchanan v. Thomason*, 70 Ala. 401, and cases cited; Freeman on Judgments, § 90; *Harris v. Billingsley*, 18 Ala. 438; *Nolan v. Locke*, 16 Ala. 52; *Slatter v. Glover*, 14 Ala. 648; *Griffin v. Griffin*, 40 Ala. 296; *Cole v. Conolly*, 16 Ala. 271; *Barron v. Tartt*, 18 Ala. 668; *Lyon v. Odom*, 31 Ala. 234. As to the plaintiffs in the action, the verdict was general and sufficient, and it could not be set aside at a subsequent term.—*Chapman v. Holding*, 60 Ala. 522; *Alexander v. Wheeler*, 69 Ala. 332; and cases above cited. The order setting aside the verdict and judgment being void, the original judgment was not affected thereby; and it was properly amended *nunc pro tunc*, on the evidence adduced.—*Taylor v. Harwell*, 65 Ala. 1, 16; *Nabors v. Meredith*, 67 Ala. 335. See, also, the following cases: *Hair v. Moody*, 9 Ala. 399; *Byrd v. McDaniel*, 26 Ala. 582;



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*Rose v. Thompson*, 17 Ala. 628; *Vaughan v. Robinson*, 22 Ala. 519.

STONE, C. J.—The appellees, Moore and others, brought a statutory real action for the recovery of a lot of land in the city of Huntsville, described in the complaint by metes and bounds. The action was commenced in 1876, against Reagan, and Mrs. Coltart was, at her instance, made defendant as the asserted owner of the lot. She pleaded “not guilty,” and suggested upon the record that “she, and those whose possession she has, for three years next before the commencement of this suit, have had adverse possession of the property sued for, and during said adverse possession she and those whose possession she has have put upon said property permanent improvements, of the value of two thousand dollars.” At the December term, 1878, the case came on to be tried on the issues stated above, and the judgment-entry, after stating the organization of the jury, proceeds to affirm that they, “on their oaths, do say, ‘We, the jury, find the issues in favor of the plaintiffs, and allow the defendants all rents accrued, and seven hundred and seventy-four dollars over the rents for improvements, and that the suggestion of three years adverse possession and improvements is true.’ It is further ordered by the court, that the plaintiffs have and recover judgment against the defendants, for the costs in this behalf expended, for which let execution issue.” This is, in substance, the whole of the judgment-entry.

The proceedings in this suit were under the Code of 1876, chap. 5, title 1, part 3, commencing with section 2948. The particular sections which deserve consideration in this case are 2951 to 2954, inclusive. It will be seen that the judgment is very imperfect. It not only fails to describe the land recovered, but it fails to render judgment for the land. The judgment might have been corrected, and made full in this particular, by reference to the complaint, which contains a sufficient description. There is, however, a serious defect, found alike in the verdict and in the judgment, for the correction of which the record furnishes us no *data*. The verdict, after ascertaining that the suggestion of three years adverse possession was true, that the value of the permanent improvements exceeded the amount of the rents, and the amount of the excess, should have gone farther, and found “the value of the lands and tenements, . . . not including the increased value thereof by reason of the improvements.”—Code, § 2952. In the absence of such finding, the truth of the suggestion of adverse possession and improvements being first found, the verdict did not respond to all the issues, and a proper judgment, doing com-

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plete justice between the parties, could not be rendered. We are unable to perceive how a judgment, pursuing the verdict, could have been executed, unless the plaintiff voluntarily paid the excess of improvements over the rents. The statute requires a stay of execution for one year, and only for one year, "unless the plaintiff, or his legal representative, pay the defendant, or deposit with the clerk for him, the excess of the assessed value of the improvements over the value of the use and occupation."—Code, § 2953. If he fail to pay such excess, then the defendant is not without remedy. If the payment be not made within the year, the defendant has other three months within which to pay the assessed value of the land, and doing so, the plaintiff is forever barred of his writ of possession.—Code, § 2954. How can this payment be made, if there has been no assessment of value?—See *Gager v. Gordon*, 29 Ala. 341.

We have no doubt that, when the verdict was received, the Circuit Court should have sent the jury back, that they might inquire of, and respond to the question of the value of the lands, irrespective of the improvements. We have as little doubt that, if he had refused to do so, and had rendered judgment on the verdict, that judgment would have been reversed on appeal to this court. Nor do we doubt the duty of the court to set aside the verdict, and award a *venire de novo*, if it had been moved for during the term at which the verdict was rendered. Neither of these lines of conduct was pursued in this case.

At the next term—June, 1879—the plaintiffs, Moore and others, moved to set aside the verdict of the jury, and reinstate the case upon the trial docket, for the following (among other) reasons: 1st. The same is void upon its face. 3d. It finds only a part of the issues. This motion was granted by the court. No further orders in the cause appear in the record before us, until the June term, 1882. At that term appears the following entry: "Came parties by their attorneys, and death of Fannie Thompson, a plaintiff in this cause, is suggested; and ordered by the court, that this cause be, and is hereby continued." At the summer term—August, 1883—the following entry was made: "Came parties, by their attorneys, and plaintiffs allowed to substitute complaint. Substituted complaint filed. Marriage of Fannie B. Moore to John A. Thompson before her death suggested, and leave to revive her interest in suit in name of John A. Thompson." No other orders appear in the transcript, between June, 1879, and February, 1884.

At the February sitting, 1884, the plaintiffs filed a petition, and made a motion in the Circuit Court, to vacate and set aside said order of June, 1879, to remit the cause to its *status* before

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that order was made, and to enter up, *nunc pro tunc*, the proper judgment of the court on the verdict of the jury rendered in December, 1878. That motion was resisted, but was in all respects granted by the court. The judgment is in all things formal, except that neither the verdict nor the judgment ascertains the value of the land sued for. Exception was reserved to the ruling of the court, and the same is here assigned as error.

For appellee it is contended, that the order of June, 1879, setting aside the verdict and judgment of December, 1878, being made at a subsequent term, the court was without jurisdiction in the premises. and consequently the vacating order was a nullity. From this postulate the conclusion is claimed, that the court did not err in the order of February, 1884; for all courts may vacate and set aside void orders previously made by them. The position is sound, if the conditions justify its application.—*Jones v. Brooks*, 30 Ala. 588. We consider it unnecessary to decide this question. Conceding that the verdict and judgment of December, 1878, were final and conclusive, and beyond all power of revocation or modification by that court at a subsequent term; the court, nevertheless, did set the verdict and judgment aside, and did restore the case to the docket. At that stage, the regularity of that order might have been tested. It was not done. At subsequent terms, counsel appeared without objection, and orders were asked and granted, as upon a pending case in court; and this continued for four years. This was a waiver of all irregularity in the order of June, 1879, if there was such irregularity.—*Byrd v. McDaniel*, 26 Ala. 582; *Johnson v. Bell*, 71 Ala. 258; *St. Clair v. Caldwell*, 72 Ala. 527.

The judgment *nunc pro tunc*, and the orders made February, 1884, are reversed and annulled, and the cause restored to the docket as an undecided cause.

Reversed and remanded.

## Lowe v. Martin.

*Statutory Action in nature of Ejectment, by Purchaser at Tax-Sale.*

1. *Sale of lands for unpaid taxes; description of lands in tax-collector's docket, assessed to "owner unknown."*—Under the provisions of the act approved February 12th, 1879, relating to the sale of lands for delinquent taxes (Sess. Acts, 1878-9, pp. 3-8, § 1), lands assessed to "un-



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known owners" were required to be entered and described, in the docket filed by the collector in the office of the probate judge, "in the beat where the land is situate;" and the entries in this docket are the basis of the jurisdiction of the court to order a sale. But it is no objection to the validity of the sale, that several tracts of land, situated in different townships, are entered on the docket as assessed to "owners unknown," without specifying the particular beat or precinct in which the different tracts lie: as to these matters, in the absence of evidence, the court will not impute negligence to the officer, by presuming that the several tracts are in different beats.

2. *Auditor's certificate to purchaser.*—Under the provisions of the act approved February 13th, 1879 (Sess. Acts 1878-9, p. 13, § 18), the auditor's certificate of transfer passed to the purchaser all the title acquired by the State as purchaser at the tax-sale; and it was not required to be either attested or acknowledged, as is now necessary to perfect his deed.

FROM the Circuit Court of Chilton.

Tried before the Hon. JAMES E. COBB.

This action was brought by James S. Martin, against E. H. Lowe and others, to recover the possession of a tract of land, which was described in the complaint as the west half of the north-east quarter of section twenty-five (25), township twenty-two (22), range fourteen (14); and was commenced on the 29th December, 1884, as shown by the summons and complaint copied in the transcript, though the bill of exceptions recites that the action was commenced on the 30th September, 1885. The trial was had on issue joined on the plea of not guilty.

On the trial, as appears from the bill of exceptions, "the plaintiff offered in evidence so much of the book or docket of the tax-collector, filed in the office of the probate judge, as required by law, by the first day of March, and alleged to contain a list of the delinquent tax-payers for the year 1880, as showed that the land sued for was returned, showing in one assessment, to 'owners unknown,' the following described lands"—viz., in township twenty-two (22), range fourteen (14), subdivisions of sections 35, 26, 24, and the lands sued for in section 25; also, parts of sections in townships 20 and 21, range 14, part of a section in township 23, range 15, and several lots in the town of Clanton. "This book was proved, and showed, as stated, that the land sued for was entered therein as assessed to 'unknown owner,' and also the amount of taxes and charges due thereon." The defendants objected to the admission of this book as evidence, but without specifying any particular ground of objection; and they excepted to the overruling of their objection. "The plaintiff then offered in evidence the decree of the Probate Court of said county, made and entered up in form as required by law, condemning said lands to be sold for unpaid taxes for the year 1880, and ordering that they be sold; which decree recited, 'that notice has been given, as required by law, that a motion would be made for a decree of

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sale of said lands for the payment of said taxes.' The defendants objected to the admission of said decree as evidence, but the court overruled their objection; and they excepted. The plaintiff then offered in evidence, after proving the same, the record of tax-sales, kept as required by law, and containing recitals as required by law, showing that said lands were sold for unpaid taxes, on the 13th June, 1881, and purchased by the State; to which the defendants objected, and duly excepted to its admission against their objection. The plaintiff then offered in evidence the auditor's certificate to him as the purchaser of said lands from the State," which was dated December 11th, 1883, and purported to transfer to plaintiff "all the rights acquired by the State to the lands above described, under and by virtue of said sale for taxes." The defendants objected to the admission of this certificate as evidence, and duly excepted to the overruling of their objection.

This being all the evidence, the court charged the jury, on the request of the plaintiff, that they must find for the plaintiff, if they believed the evidence. The defendants excepted to this charge, and they now assign it as error, together with the several rulings on evidence to which, as above stated, they reserved exceptions.

WATTS & SON, and W. E. JOHNSTON, for appellant, cited *Driggers v. Cassidy*, 71 Ala. 529; *Oliver v. Robinson*, 58 Ala. 46; *Boyd v. Holt*, 62 Ala. 296; *Gilchrist v. Shackelford*, 72 Ala. 7; *Childress v. Calloway*, 76 Ala. 128; *Boykin v. Smith*, 65 Ala. 295; Burr. Taxation, 281-83.

WM. A. COLLIER, and J. S. EDWARDS, *contra*.

SOMERVILLE, J.—It is contended that the plaintiff has no title to the land sued for in this action, because the Probate Court had no jurisdiction to make the sale for delinquent taxes, at which the State of Alabama purchased on June 13, 1881, and through which the plaintiff derives his claim of title. This sale was made under the provisions of the act of February 12, 1879, relating to the sale of real estate for delinquent taxes.—Acts 1878-79, pp. 3-8. The irregularity relied on to vitiate the sale is supposed to be found in the assessment-list, or "docket," which the tax-collector is required, by the first section of this act, to file with the probate judge by the first of March of each year. The collector is required to enter in a substantially bound book, "in the manner usual in docketing causes for trial in the Circuit Court," each parcel of real estate, describing it in the same manner it was assessed, with the amount of the unpaid taxes and charges due. This book, or

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docket, when properly prepared and delivered to the judge of probate in his office, becomes the basis of all the subsequent proceedings by which the sale is consummated, and is the source of the Probate Court's jurisdiction to make such sale.—*Driggers v. Cassidy*, 71 Ala. 529. Where assessments of land have been made, as in the present case, to some "unknown owner," they are required to be entered by proper description, with the amount of taxes and charges due thereon, and "in the beat where the land is situate." And "in each case" the fact must be stated that the land was so assessed.—Acts 1878-79, § 1, pp. 3-4.

The record shows that the land sued for was accurately described, and was entered in the book or docket of the tax-collector, which he filed with the probate judge within the required time, as assessed to "unknown owner," with a statement of the amount of taxes and charges due thereon. Under the same head of "unknown owner" there are also included some other lands besides the tract in controversy. No mention is made of the particular beats or precincts in which the land is situated, nor is there any statement made from which we can infer any thing in reference to this matter. We can not know that these lands, as thus assessed to "unknown owner," were not in the same beat or precinct. We will not assume the contrary, when the effect of such presumption would be to impute negligence to a sworn officer, in the discharge of his duty, and error to the court in its ruling. If the lands are in the same beat, we do not see how the validity of an assessment can be affected by including in it more than one tract or parcel of land as belonging to an "unknown owner."

There is no defect in the proceeding, which, in our judgment, affected the jurisdiction of the court to make the sale.

There is no force in the suggestion, that the certificate of transfer made by the State Auditor to the plaintiff, on December 11, 1883, was inoperative to convey the legal title to the lands described in it, unless signed in the presence of a witness, or acknowledged before an officer authorized by law to take acknowledgment of deeds. This certificate was executed under the express authority conferred by the act of February 13, 1879.—Acts 1878-79, § 18, p. 13. Its effect was, *proprio vigore*, to transfer to the plaintiff, as purchaser, whatever title the State acquired by virtue of the proceedings at the tax-sale. The act required, for this purpose, only a certificate of transfer to be signed by the Auditor, thus differing essentially from the law now in force, which requires a deed to be executed by him in due and regular form.

We discover no error in the record, and the judgment is affirmed.



**Jones v. Massey.***Creditor's Bill in Equity to set aside Fraudulent Conveyances.*

1. *When creditor without lien may come into equity to set aside fraudulent conveyance.*—By statutory provision (Code, §§ 3886), a creditor without a lien, or by simple contract only, may file a bill in equity to subject to the payment of his debt property which his debtor has fraudulently transferred, or attempted to transfer; but he can not file such a bill before the maturity of his debt, though he might sue out an attachment at law.

2. *Allegations of creditor's bill; certainty and definiteness.*—In a creditor's bill, seeking to set aside a conveyance by his debtor on the ground of fraud, the facts constituting the alleged fraud must be stated, and it is not sufficient to allege, in general terms, that the debtor has fraudulently transferred, or attempted fraudulently to transfer his property, with the intent and purpose to defraud complainant and his other creditors.

APPEAL from the Chancery Court of Coosa.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 2d January, 1886, by E. V. Jones, against Alfred J. Massey; and sought to set aside conveyances of his property by said Massey, alleged to have been made with the intent to defraud the complainant and other creditors. The complainant's debt, according to the allegations of the bill, was evidenced by the defendant's promissory note for \$85, dated December 1st, 1885, and payable on the 1st March, 1886. The bill alleged, that said Massey was a partner in the firm of Bazemore Brothers & Co.; that said partnership had lately failed, and all its property had been attached at the suit of creditors, to which suits Massey was a party, and was liable for all the debts of the partnership; and then followed these allegations: "Orator charges and avers, that said Massey was and is the owner of property, real and personal, in his own name and right, at the time of the making of said note, which was and is liable to the satisfaction of your orator's said debt; and that said Massey, since the failure of said Bazemore Brothers & Co., has fraudulently transferred, or attempted to transfer fraudulently, the property owned by him, both real and personal, which is liable to satisfy his debt, with the purpose and intent to defraud your orator and his other creditors; and your orator further charges and avers that the parties to whom said conveyances have been made, knew of, and

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participated in said intent and purpose of said Massey; but your orator can not state to whom said conveyances have been made, or attempted to be made, as the same are now unknown to your orator; and he can not state the terms and conditions of said conveyances, or whether the same are in writing or not. Your orator charges and avers, that said Massey has fraudulently transferred, or attempted to fraudulently transfer and convey, two lots in the town of Rockford in said county, on which is a blacksmith and wood-shop, now occupied or rented by Woolf & Johnson, who claim no interest therein except as tenants for the present year. Your orator can not describe said lots by their division and bounds according to the survey of said town of Rockford, and he can not now state to whom said conveyances have been made; but he avers that said party or parties know of, and participated in the intent and purpose of said Massey to defraud his creditors." On these allegations, the bill prayed that an account be taken to ascertain the amount due to the complainant on his said debt; that, on final hearing, said two lots in Rockford, and all other property fraudulently transferred by said Massey, or attempted to be fraudulently transferred by him, be condemned to the payment of complainant's debt; and for other and further relief, under the general prayer.

The chancellor sustained a demurrer to the bill, on the grounds (with others), that the complainant's debt was not due when the bill was filed, and that the bill only charged fraud as a legal conclusion, without stating any facts which show an intentional fraud. The decree sustaining the demurrer, and dismissing the bill, is now assigned as error.

L. E. PARSONS, Jr., for appellant.

WATTS & SON, *contra*.

CLOPTON, J.—The bill is filed under section 3886 of the Code, which authorizes a creditor without a lien to file a bill in chancery, to subject to the payment of his debt any property which has been fraudulently transferred, or attempted to be fraudulently conveyed, by his debtor. The purpose and operation of the statute are to dispense with the necessity of obtaining a judgment at law, thereby establishing the justness of the demand, and to confer on a creditor without a lien the rights of a judgment creditor, so far as a judgment was essential to the jurisdiction of the court. The statute does not exempt such suit from the general rule, which prevails in equity as well as at law, that no suit can be maintained before a cause of action has accrued; and does not confer on a creditor the right

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to bring a bill to subject property to the payment of his debt, before its maturity, and before he is authorized to maintain an action at law on the demand. The bill having been filed before the maturity of the debt, it was prematurely brought. The remedy, in such case, if the creditor deems a lien essential, is an attachment at law, where he is required to make affidavit and give bond to indemnify the debtor, if the attachment is wrongfully or vexatiously sued out.

The bill is also defective, in failing to allege the facts, from which the fraud is supposed to arise. A general averment of fraud, which is a conclusion of law from facts, without stating the facts, is not sufficient. The bill does not allege or exhibit any conveyance made, or attempted to be made; but only makes the general averment, that the debtor was fraudulently transferred, or attempted to fraudulently transfer his property, with the purpose and intent to defraud complainant and his other creditors. A decree can not be made on such averment. *Flewellen v. Crane*, 58 Ala. 627.

Affirmed.

## Lane v. Westmoreland.

### *Bill in Equity for Foreclosure of Mortgage.*

1. *Surety's right to coerce indemnity.*—As a general rule, a surety or guarantor can not recover indemnity until he has been damnified—that is, until he has paid the debt; and even a payment, if made voluntarily and unnecessarily, neither increases nor accelerates his right to coerce indemnity.

2. *Extinguishment of debt, by appointment of debtor as administrator of creditor's estate.*—When the executor of a deceased creditor recovers a judgment against the debtor, and the latter becomes his successor in the administration, the judgment is extinguished by operation of law, the duty to pay and the right to receive being united in the same person.

3. *Same; surety's right to indemnity.*—The defendant in a judgment at law, having created the debt for the joint benefit of himself and several other persons, from whom he took a mortgage, with power of sale, conditioned that he “should have said judgment to pay out of the proceeds of his own property;” and having afterwards become the administrator of the estate of the deceased creditor, whereby the debt was extinguished by operation of law, may then foreclose the mortgage, notwithstanding his voluntary act in taking on himself the administration of the creditor's estate.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. S. K. McSPADDEN.

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The bill in this case was filed on the 5th August, 1885, by Mrs. May F. Westmoreland (formerly Lane) and her husband, Theodore Westmoreland, against Mrs. Martha N. Lane and others; and sought to foreclose a mortgage, a copy of which was made an exhibit to the bill. The mortgage was dated June 16th, 1882, and was signed by all of the defendants. Its recitals and condition were in these words:

“Know all men by these presents, that Martha N. Lane was the owner of certain real estate hereinafter described, which was sold for taxes on the same; and whereas the said Martha N. was, at the time, unable to redeem the said real estate; and whereas May F. Lane, now Westmoreland, borrowed a certain sum of money from James M. Lane, for which she executed her promissory note for \$600, and which was due on the 29th July, 1873; and whereas said money was used for the purpose of redeeming the said real estate which had been sold for taxes as aforesaid; and the said James M. Lane has departed this life since the execution of said note, and Elijah M. Hussey, as the executor of his last will and testament, brought suit on said note, and recovered a judgment against the said May F. Lane (now Westmoreland), at the Spring term, 1877, of the Circuit Court of Limestone county, which judgment is still unsettled and unsatisfied: Now, this indenture, made and entered into by Martha N. Lane, Kate Lane Townes and her husband, Robert R. Townes, Hestor D. Lane and his wife, Madge M. Lane, and Charles P. Lane and his wife, Ella A. Lane, for and in consideration that they are indebted to the said May F. Westmoreland in the sum of \$1,050.70, being the full amount of said judgment, with interest and costs to this date; now, therefore, for the purpose of securing the said May F. Westmoreland in the payment of said sum of \$1,050.70, in case she should have to pay the same, we have granted,” &c.; “upon condition, however, that if the said May F. Westmoreland should have said judgment to pay out of the proceeds of her own property, or should have to pay said judgment in cash to keep her own property from being levied on and sold, then she should advertise said property for sale, for thirty days,” sell the same, and pay the said debt, with interest and costs, &c.; “but, if the said May F. Westmoreland should never have said judgment to pay, then this obligation to be void.”

The bill alleged that Mrs. Martha N. Lane owned a life-estate only in the property, the remainder being vested in the complainant and the several defendants; that E. M. Hussey, the executor, died soon after the execution of the mortgage, and that letters of administration *de bonis non* on the estate of said James M. Lane were granted, in October, 1882, to Mrs. Westmoreland and her husband; and they insisted that the

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judgment against her was thereby paid and extinguished, and they were entitled to foreclose the mortgage.

The defendants demurred to the bill, for want of equity, on the ground that the condition had never been performed; and that the complainants could not, by their voluntary act in taking on themselves the administration of the estate of the deceased creditor, impose any liability on the mortgagors. The chancellor overruled the demurrer, and his decree is now assigned as error.

L. W. DAY, and SHELBY, WALKER & SPRAGINS, for the appellants, cited the following authorities: Brandt on Suretyship, §§ 191-94; 2 Jones on Mortgages, §§ 379-87, 1213, 1471-2, 1489; *Savings Bank v. Pomeroy*, 115 Mass. 573; *Tilford v. James*, 7 B. Mon. 336; 38 N. H. 127; *McLean v. Ragsdale*, 31 Miss. 701; *Curtis v. Goodenow*, 21 Mich. 18; *Coleman v. Post*, 10 Mich. 422; 21 Mich. 276; 8 Conn. 37; 68 Maine, 449; 34 Ala. 404; 77 Ala. 553, 572.

R. C. BRICKELL, *contra*, cited 2 Williams on Executors, 1418-24; 2 Jones on Mortgages, § 1188; *Miller v. Irby*, 63 Ala. 482; *Leland v. Felton*, 1 Allen, Mass. 531; *Butler v. Ladue*, 12 Mich. 173.

STONE, C. J.—A surety, or guarantor, can not recover indemnity from the principal, or indemnitor, until he has been damnified; in other words, until he has paid the debt; unless there is a clause in the contract of indemnity, which varies this general rule. And even a payment, improperly or needlessly made, is insufficient to fix the liability of the guarantor. To have that effect, there must be a present legal liability to pay. If the instrument sets forth the event, or contingency, on the happening of which the payment may be made; or, if, considering the entire transaction, certain future or contingent events, one or more, must precede the liability to pay, their payment can not properly be made until the happening of such event. The liability of the principal can not be increased nor accelerated by the voluntary, unnecessary act of the surety. He must wait until he is legally liable to pay, and subject to be coerced to pay. Of course, we speak of the general rule; for, if there be special stipulations, they determine the mode and measure of liability.—Brandt on Suretyship, §§ 191, 194; *Reynolds v. Magness*, 2 Ired. Law, 26; *St. Albans v. Curtis*, 1 D. Chipm. 164; *Gennings v. Norton*, 35 Me. 308; *Gilbert v. Wiman*, 1 Comst. 550; *Gibbs v. Mennard*, 6 Paige, 258; *Shepard v. Shepard*, 6 Conn. 37; *Kieffer v. Kieffer*, 3 Bin. 126; *McLean v. Ragsdale*, 31 Miss.

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701; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Pope v. Davidson*, 5 J. J. Marsh. 400.

The present bill was filed to foreclose a mortgage on real estate, described in the bill and mortgage attached to it as an exhibit. In the property mortgaged, Martha N. Lane had a life-estate, remainder to May F. Lane, Kate L. Townes, Hector D. Lane and Charles P. Lane, as tenants in common. The life-tenant, Martha N. Lane, failing to pay the taxes, the land—a town lot—was sold for their payment. To redeem the lot from such tax-sale, May F. borrowed money from James M. Lane, and gave her note therefor. With that money the lot was redeemed. James M. Lane died, and Hussey, his executor, brought suit on said note, and recovered judgment against May F., for the amount of the note and interest. Thereupon, Martha N. Lane, the life-tenant, and the remaining three tenants in remainder, united in the execution of a mortgage on said lot to the said May F., to indemnify her against liability on said judgment, with power of sale on a contingency therein expressed. May F. had then become the wife of Thos. Westmoreland.

After the execution of said mortgage, the said judgment still remaining uncollected, Hussey, the executor, died, and Thos. Westmoreland and May F., his wife, were appointed and qualified as administrator and administratrix *de bonis non* with the will annexed, of the estate of James M. Lane. The present bill is filed by May F. Westmoreland and her husband, as joint complainants, and prays a foreclosure of said mortgage, and a sale of the lot for that purpose. There was a demurrer to the bill, which the chancellor overruled; and from that decretal order this appeal is prosecuted.

The power of sale in the mortgage is expressed in the following language: "Upon condition, however, that if the said May F. Westmoreland should have said judgment to pay out of the proceeds of her own property," etc., then she may advertise and sell. The *gravamen* of the demurrer is, that the bill fails to show the judgment has been paid, and especially fails to show it has been paid out of the proceeds of Mrs. Westmoreland's property.

The theory on which the equity of the bill is rested is, that when Mrs. Westmoreland became one of the administrators of James M. Lane's estate, and qualified as such, she thereby acquired the right to receive and recover the money due from herself on said judgment; and, filling the dual relation of both debtor and creditor—the obligation to pay and the duty to collect centering in her—the law, from the necessity of the case, pronounced the debt paid. This is undoubtedly the law. The debt, as a debt against Mrs. Westmoreland individually,



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became extinguished, and a liability for a corresponding amount attached at the same instant to her, as administratrix of James M. Lane. This was assets in her hands as administratrix, liable for debts and for distribution; and neither herself nor her sureties could question the liability, nor the amount of it. It was money assets in hand.—*Miller v. Irby*, 63 Ala. 477; *Leland v. Felton*, 1 Allen, 531; 2 Wms. Ex'rs, Perkins' edition, 1421; m. p. 1311.

It is contended, however, that this is only a constructive payment, and that it was not made by Mrs. Westmoreland with the proceeds of her own property. With whose property, or its proceeds, was it made? Certainly, not the property of defendants, nor of any other third person or party. The meaning of this clause is, that this liability is to be extinguished by Mrs. Westmoreland's own means and resources; and if she had borrowed money, and with it discharged the judgment, it certainly could have made no material difference in the case. Technical strictness in such cases is not required. *Daniel v. Hunt*, 77 Ala. 567; 2 Jones on Mortgages, §§ 1188, 1471; *Tilford v. James*, 7 B. Monroe, 336; *Butler v. Ladue*, 12 Mich. 173.

It is objected, however, that Mrs. Westmoreland's payment must be treated as voluntary, because she voluntarily took upon herself the administration, which effected the constructive payment. We can not agree to this. It is the policy of the law that good and suitable persons shall be appointed to the administration of estates; and if, in making such appointment, results, such as are here complained of, follow, this is no reason why the selection should not be made, nor why all legitimate consequences should not follow from it. Voluntarily taking the administration, can not be regarded as the equivalent of a voluntary payment of the debt. The payment is but the legal effect of an act, lawful in itself, and not apparently intended to bring it about. We do not consider such case within the rule, which condemns a voluntary and unnecessary payment.

It is the duty of the personal representative of an estate, to reduce the assets into his possession, as soon as he conveniently may. This, that he may pay the debts of the estate, if there be such, and distribute the *residuum*, as the will or the law may direct. No person, whether debtor to the estate or outsider, can dispute the right of the personal representative to so possess himself of the assets. What shall become of them afterwards, can not be made an inquiry at this stage of the proceeding. The law determines that..

There is no misjoinder of parties complainant.—*Sawyers v. Baker*, 72 Ala. 49.

Affirmed.

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## Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co.

*Action on Common Counts, with Special Counts on "Labor-Tickets."*

1. *Assignment of printed "labor-tickets."*—The printed certificates sued on in this case, issued by the defendant corporation, or by its authority, and denominated "labor-tickets," being made payable on their face "to employees only," and declared to be "not transferable," will not support an action by an assignee in his own name.

2. *Same.*—Such restriction on the transfer of the certificates is not contrary to any principle or policy of the law, but negatives the idea that they were intended to circulate as change-bills, and prevents a discount or set-off against the original party from becoming unavailable.

3. *Demurrer to complaint containing common counts, with defective special counts.*—When the complaint contains special counts which are defective, and also the common counts, a demurrer to the entire complaint can not be sustained.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by the appellants, suing as partners, against the Sheffield Land, Iron & Coal Company, a private domestic corporation; and was commenced on the 25th August, 1884. The complaint contained eight counts, of which the first five were special counts on certain printed certificates, called "labor-tickets," of which the plaintiffs claimed to be the owners by assignment; the sixth claimed \$1,014.10, "due from said defendant by account stated between defendant and plaintiff's transferees, on the 15th June, 1884, which account is now due and unpaid, and is the property of plaintiff;" the seventh claimed the further sum of \$1,014.10, "due from said defendant for work and labor done for defendant, at its special instance and request, by laborers whose names are unknown to defendant (?), during the months of April, May, and June, 1884, which sum, with the interest thereon, is now due and unpaid, and is the property of the plaintiff;" and the eighth, the further sum of \$1,014.10, "money paid by plaintiffs for defendant, on the 15th June, 1884, at defendant's request." The printed certificates, or "labor-tickets," as they are called, on which the special counts were founded, over 1,200 in number, were made "payable June 15, 1884, to employees only," marked "not transferable," and had the letters "E. P. M."

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printed across the end of each; and they were of four classes—namely, “one day,” “half-day,” “quarter-day,” and “ten cents.” As to these tickets, each of the special counts averred, “that each of said tickets was given for one day’s work” [or a “half-day,” or “quarter-day,” as the case might be] “done by laborers for defendant; that the signature, E. P. M., was made by E. P. Miller, the agent of said corporation; that each is a certificate to the holder that he was entitled to receive from the defendant one dollar and twenty cents” [or sixty cents, or as the case might be], “for work and labor done by him for said defendant, and was issued to the respective laborers by said defendant, by its agent, E. P. Miller, after said work had been done, and to be paid on the 15th June, 1884; that said work was done, and said tickets were given, in the year 1884, before said 15th June; that each was transferred to plaintiff before this suit was brought, and is their property, and due and unpaid; and they claim the amount thereof, to-wit,” &c., with interest.”

The certificates, one of which was set out in each special count, were in the following form:

SHEFFIELD LAND, IRON, AND COAL COMPANY.

LABOR TICKET.

ONE DAY.

*Payable June 15, 1884, to Employee Only.*

NOT TRANSFERABLE.

E.  
P.  
M.

An amended complaint was afterwards filed, containing several of the common counts in the usual form, and several special counts on the printed certificates, each of which averred the issue of said certificates by the defendant corporation, to persons who had performed work and labor for it, as evidence of the amount due such persons, “whose names are unknown to plaintiffs;” that said certificates constituted a stated account with each of said persons, and were the property of plaintiffs.

The defendant demurred “to the complaint, original and amended,” assigning the following (with other) grounds of demurrer: (1.) “Because plaintiffs do not allege, in any of the counts of said complaint, the names of the parties by whom said work and labor was done or performed, or to whom said money was paid at defendant’s request.” (3.) “Because the tickets, or statements, set out in the complaint, show on their face they were not transferable, and were payable to employees only;



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and plaintiffs do not allege they were the employees."

(4.) "Because the evidence of said labor or work done, as shown by said tickets set out in the complaint, were not negotiable, and were payable to employees only, and were not signed by any one purporting to be the agent of the defendant."

(5.) "Said tickets are not contracts, express or implied, for the payment of money; and an action on them can only be instituted by the party having the legal title." (6.) "Said tickets, upon which each count in the complaint is founded, are on their face payable to employees only, and are not transferable to any other person or persons, whereby any right, title or interest whatever could be, or was vested in the holder or transferee thereof." The court sustained the demurrer, on each of these grounds, and, the plaintiffs declining to amend, rendered judgment "that this suit be dismissed, and defendant go hence."

The judgment on the demurrer, and the judgment dismissing the suit, are now assigned as error.

JAMES JACKSON, for the appellant.

EMMET O'NEAL, *contra*.

SOMERVILLE, J.—The action is brought by the appellants, as plaintiffs in the court below, against the appellee, a body corporate, to recover a certain amount alleged to be due them as transferees of a large number of labor-tickets, or time-checks, issued by authority of the defendant. These instruments are printed, and are denominated, on their face, each, as being a "labor-ticket." The name of the defendant company—the "Sheffield Land, Iron and Coal Company"—appears at the top, and not as a subscribed signature. On the right margin, and across the face of the paper, the initials "E. P. M." occur, which are alleged to have been signed by one E. P. Miller, the agent of the defendant. The words "one day," etc., occur, without specifying any particular sum due for such time or service, except in case of a few tickets, which call for small amounts. All of these tickets are payable June 15, 1884, "to employees *only*," and are indorsed "*not transferable*." No averment is made in the complaint, that they were issued as change-bills, and were intended to circulate as money, in contravention of the statute. The common counts are added, and the averment is made, that the transferees are unknown by name to the plaintiffs.

The Circuit Court, on demurrer to the complaint, held that the action would not lie; and on refusal of plaintiffs to amend, the suit was dismissed.

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We are of opinion, that this ruling was free from error. The certificates show, on their face, that they are payable to the employees only, and to no one else. They are expressly declared not to be transferable, which negatives any promise of defendant, otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employees, when they received them; and the plaintiffs took the instruments with full notice of this restriction, because it appeared on the face of the paper. The transferability of the paper was thus destroyed, by the consent of the original parties to it.—*Durr v. The State*, 59 Ala. 24.

It can not be said, that the policy of the law is opposed to the restriction thus imposed. On the contrary, under the peculiar circumstances of this case, it highly favors such restriction. At common law, *choses in action* were not transferable, their transfer being enforced only in equity. This ancient rule has been abrogated only by the necessities of modern commerce. But there is a certain kind of paper, passing under the name of "change-bills," which are prohibited by statute to be issued in this State, without special authority of law. They include bills of exchange, notes, bonds, or "instruments of any description, whatever may be their form or device," which are issued with intent to circulate as money. Corporations, or other persons, who issue or circulate such paper, without authority of law, are liable to indictment, and to a heavy civil penalty of interest at fifty per cent. *per annum*.—Code 1876, §§ 4433-34, 1424-26. \* It was very important for defendant that its officers should not be liable to this penalty or punishment. If the certificates in question were permitted to pass from hand to hand by transfer, it might be strong evidence of an intention on the part of the maker that they should circulate as money, and answer all its purposes in the business of the company, or even in the neighborhood of its residence. A proper mode of rebutting the existence of such intention was to make the paper non-transferable. There might be circumstances under which this mode of restriction would afford the only protection practicable to the maker, short of perpetual litigation rendered unendurable by the multiplicity of suits which could be instituted on such a form of paper.—*Barnett v. The State*, 54 Ala. 579; *Bliss v. Anderson*, 31 Ala. 612.

There is yet another reason, why the policy of the law would favor a contract by the employee that the promise should not be transferable, but should enure to his benefit only. There may have been discounts, by way of set-off in favor of defendant, against some of the employees, which could be available only so long as the names of these particular promisees were

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known. The paper, not being negotiable, would be subject to this equity. If allowed to pass to a stranger, it might often be impracticable to ascertain who was the original holder, and the right would thus be lost. Such certificates, or tickets, moreover, are often placed in the hands of employees as a convenient mode of making advances to them for their services, especially when payable in merchandise, as they frequently are. As the law should encourage humanity to the needy, so it should favor any contract intended to prevent a transfer of paper which would operate as a fraud on any benevolent intentions of the maker.

The assignments of demurrer were well taken to all except the common counts. The latter counts were in the form prescribed by the Code, and the court erred in not holding them good.

Reversed and remanded.

CLOPTON, J. not sitting.

## Hardin v. Pulley.

*Bill in Equity by Infants, as Creditors of Insolvent Estate of Deceased Father, claiming Exemptions and Landlord's Lien on Crops.*

1. *Landlord's statutory lien; attaches when.*—The lien given by statute to a landlord, or his assignee, on the crops grown on the leased premises, for the rent of the current year (Code, § 3467), only attaches when the relation of landlord and tenant exists between the parties.

2. *Landlord and tenant; when relation exists.*—While the relation of landlord and tenant may be created by express contract, or by the conduct of the parties towards each other, it will not be inferred from the mere fact of occupation only, when the relative position of the parties to each other, in the particular case, can be referred to any other distinct cause.

3. *Same; as between infant devisees and paternal trustee.*—Where lands are devised to infant children, their father being appointed executor and trustee, with power to manage and control the property for them; whatever may be his liability to them, in a proper proceeding, for rents and profits, the relation of landlord and tenant does not exist between them, and they have no statutory lien on the crops raised by him on the lands, and received and sold by his administrator.

4. *Laches of infant, or guardian.*—As a general rule, laches will not be imputed to an infant, and his rights are not waived by his failure to assert them promptly; but there are cases in which his rights may be



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lost by the failure of his guardian to assert them, leaving him only the personal liability of the guardian for indemnity.

5. *Exemptions of personalty to decedent's family; when and how made.* Although the statute contemplates that all personal property, not specifically bequeathed, shall be included in the administrator's inventory, and that a selection of exemptions may be made from the property so inventoried; yet a selection may be made from property not included in the inventory, and even before an inventory is filed.

6. *Same.*—Where an infant's guardian selected for him, as exempt, all the personal property included in the inventory, which was appraised at \$400; and the administrator afterwards received and sold other personal property, accounting for the proceeds, after the estate had been declared insolvent, on final settlement of his accounts as administrator; on which settlement the infant was represented by a guardian *ad litem*, and no additional claim of exemptions was made; the surety on the administrator's official bond is not liable to the infant for the loss of any additional exemptions to which he might have been entitled.

7. *Insolvent estate; removal of settlement into equity.*—To justify the removal of the settlement of an insolvent estate into equity, requires a clear and strong case—a case requiring relief which the Probate Court, on account of its want of equitable jurisdiction, can not grant.

APPEAL from the Chancery Court of Madison.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 22d August, 1885, by Luty W. and Henry S. Hardin, infant children of Benjamin L. and Anne E. Hardin, deceased, suing by their next friend, against Robert L. Pulley, as the surety on the official bond of Robert Nance, deceased, as the administrator of said Benjamin L. Hardin's estate; and sought relief as follows: 1st, to charge said Pulley, as surety, with the amount of exemptions of personal property belonging to the estate of said Benjamin L. Hardin, to which the complainants claimed to be entitled as his infant children, and of which they were deprived, as they alleged, by the failure of the administrator to include said property in his inventory; 2d, to enforce a claim of \$300, for the rent of certain lands belonging to the complainants, which were cultivated by the said Benjamin L. Hardin during the year 1879, in which he died, and for which they claimed a landlord's lien on the crops received and sold by the administrator; and, 3d, for other and further relief, under the general prayer.

The facts of the case, as alleged in the bill, were these: Mrs. Anne E. Hardin, the complainants' mother, died in December, 1877, having executed her last will and testament, which was duly admitted to probate soon after her death. By her said will, the testatrix devised and bequeathed all of her property, real and personal, to the complainants; and further added, "I desire that my dear husband, Benj. L. Hardin, shall manage and control the property for my children, without giving bond." Letters testamentary were granted to said Benjamin

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L. Hardin on the 16th February, 1878, and he took possession of the lands and other property, cultivating the lands during the years 1878 and 1879; and there was a crop of cotton growing on the lands at the time of his death in September, 1879. Letters of administration on his estate were granted, soon after his death, to Robert Nance, who thereupon gave bond, with Robert L. Pulley and M. D. Nance as his sureties. Appraisers of the estate were at the same time appointed, who returned an inventory and appraisement of the property aggregating \$413.28; which was thereupon claimed for the complainants, by their guardian, as exempt, the claim allowed, and the administrator ordered to deliver the property to their guardian. The administrator gathered and sold the crops, the proceeds of sale aggregating about \$1,670; and the guardian of the complainants filed with him on the 13th November, 1879, an account against the estate for \$300 on account of the rent of their lands during the year 1879, asserting also a landlord's lien on the crops for the amount. The administrator refused to pay this claim, and disbursed the money in the payment of debts and expenses of administration. On the 15th June, 1880, on the report of the administrator, the estate of said Benj. L. was duly declared insolvent; and the complainants' account for rent was regularly filed, on the 24th July, 1880, as a claim against the insolvent estate. On the 19th July, 1880, the administrator made a final settlement of his accounts and vouchers; charging himself with amount of inventory (\$413.28), proceeds of sale of crops (\$1,696), and sales of other personal property (\$203); and claiming credits to the amount of \$1,606.44 for moneys paid out, among which was an item for \$500, "cash paid Darwin & Pulley on crop lien," the administrator himself being a member of the firm. By the account, as stated and allowed, a balance of \$89.55 was found to be in the administrator's hands, and he was continued in office as the administrator of the insolvent estate. Robert Nance died in 1881, intestate, and never having made a settlement of his administration on said Hardin's estate; and administration *de bonis non* of said insolvent estate was afterwards committed to R. E. Spragins, who made a final settlement. No administration was ever granted on the estate of Robert Nance, and the bill alleged that M. D. Nance owned no property subject to execution. The complainants claimed, on these facts as alleged, that said Pulley was, as the surety on the official bond of Nance as administrator, liable to them for the balance of exemptions to which they were entitled (\$586.72), and which they had lost by the failure of the administrator to include in his inventory the crops and other property which he received and afterwards sold, and also for the amount of their claim for rent, \$300.

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The defendant demurred to the bill, on account of the non-joinder of necessary parties, and because the complainants' remedy, if any they had, was at law, and for want of equity; and he pleaded in bar the declaration of insolvency of said Hardin's estate, and the subsequent final settlement. The chancellor sustained the demurrers and the pleas, and dismissed the bill; and his decree is now assigned as error.

D. D. SHELBY, and R. W. WALKER, for appellants.—(1.) On the facts alleged, the Probate Court could not have made a settlement of Nance's administration, which would have been binding on Pulley as his surety.—*Jenkins v. Gray*, 16 Ala. 100; *Gray v. Jenkins*, 24 Ala. 516; *Stallworth v. Farnham*, 64 Ala. 259. The complainants, as distributees of Hardin's estate, had a right to proceed against the administrator's surety; and the inadequacy of the powers of the Probate Court authorized a resort to equity.—*Moore v. Armstrong*, 9 Porter, 697; *Clark v. Eubank*, 65 Ala. 245; *Shackleford v. Bankhead*, 72 Ala. 476. That Pulley was the only necessary party defendant, see *Frierson v. Travis*, 39 Ala. 150; *Fulgham v. Herstein*, 77 Ala. 476; Code, §§ 2905, 3754. (2.) The complainants are entitled to recover of said Pulley, as surety on the administration bond, the balance due on their claim of exemption, which was lost by the failure of the administrator to return an inventory of all the property. The selection of exempt property is required to be made "from the property described in the inventory."—Code, § 2825. No *laches* can be imputed to the probate judge or the guardian, to whom the statute commits the duty of protecting the rights of the infants; since they can not be presumed to have knowledge of any property not included in the inventory, and all that was included was claimed and allowed.—*Mitcham v. Moore*, 73 Ala. 542. The failure of the administrator to return a complete inventory was a breach of his official bond, for which there is no remedy at law.—*Edwards v. Gibbs*, 11 Ala. 292; Code, § 2365. *Laches* will not be imputed to an infant, under the circumstances here shown. Tyler on Infancy, §§ 109–19; 1 Dess. S. C. 201; 1 Paige, 479; *Loeb & Weil v. Richardson*, 74 Ala. 314. That the administrator can not defeat the right of exemption by converting the assets into money, and paying it out prematurely, as he did in this case, see *Little v. McPherson*, 76 Ala. 556. (3.) The existence of the relation of landlord and tenant is a legal conclusion from the occupation of one person's land by another. Taylor's Land. & T. 14. When an administrator keeps possession of land, not for the purposes of administration, the devisee may charge him with rents as his landlord.—*Hinson v. Williamson*, 74 Ala. 197; *Steele v. Knox*, 10 Ala. 608. When



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the relation of landlord and tenant exists, the statutory lien attaches.

F. P. WARD, with whom was R. C. BRICKELL, *contra*.—(1.) The relation of landlord and tenant does not exist between a guardian and his ward, nor between a trustee and his *cestui que trust*, although there is a liability to account for the use and occupation of lands; and where that relation does not exist, there is no statutory lien for rent. (2.) If the complainants had a lien on the crops for rents, their only remedy was an action on the case against Nance.—*Hussey v. Peebles*, 53 Ala. 432. But this was the individual liability of the administrator, and it could not be enforced against his intestate's estate. *Humes v. Fariss*, 48 Ala. 612. (3.) The right of exemption, except as to the \$413 claimed and allowed, was lost, or, rather, was never perfected; and if the complainants have any remedy for the loss, it is against their guardian, who failed to protect their rights.—63 Ala. 280; 70 Ala. 381; 73 Ala. 542. (4.) If the complainants have a claim against Nance individually, the surety on his administration bond is not liable for it. If their claims are against Hardin's estate, they must fail, because his administrator is not made a party; and because the estate has been declared insolvent, and has been finally settled. (5.) The Probate Court has jurisdiction of the insolvent estate of Hardin, and no reason is shown for removing it into equity. 56 Ala. 118; 66 Ala. 296.

CLOPTON, J.—The statute creates a lien in favor of the landlord, or his assignee, on the crops grown on the rented premises, for the rent of the current year. The lien does not arise from a contract express or implied, but is attached as an incident to the relation of landlord and tenant. Unless such relation, which is the subject of contract, exists, there is nothing to which the lien can attach, and, in consequence, there is no lien.—*Scaife v. Stovall*, 67 Ala. 237. In respect to the right of complainants to recover their alleged demand for rent, the material question is, whether they and their father, Benj. L. Hardin, sustained to each other the relation of landlord and tenant. If this question be held adversely to complainants, it renders unnecessary a consideration of the liability of defendant as surety on the official bond of the administrator, for his willful and tortious acts, complained of in this respect.

The bill alleges that certain lands, described therein, were devised to complainants by the will of their mother, which was duly admitted to probate, of which Benjamin Hardin was appointed and qualified executor, in February, 1878; that he was in possession of the lands at the time of the death of their mother, as her husband, and thereafter held the same for com-

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plainants as such devisees, until his death, which occurred September 1, 1879; and raised thereon a crop of cotton, which was removed and sold by his administrator. By the will, Benjamin Hardin was empowered to manage and control the property devised and bequeathed for the use and benefit of complainants, without giving bond.

The relation of landlord and tenant is founded on contract, which may be express, or implied from the conduct of the parties towards each other in respect to the subject-matter. But the relation will not "be inferred from occupation, if the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause;" and does not exist, where the lands are occupied by a person holding the position and relation of trustee.—Taylor's L. & T., § 44. The allegation of the bill, that Benjamin Hardin held the lands for complainants, and the provisions of the will, make clear that he was occupying, managing, and controlling the lands in the capacity of either executor or trustee. The relative position of the parties may, under the allegations of the bill, be referred to the will and the power and authority conferred thereby. In such case, the relation of executor and devisees, or of trustee and *cestuis que trust*, subsists. The relation of landlord and tenant between a father, thus holding lands, and his minor children, will not be inferred.—*Russell v. Erwin*, 38 Ala. 44. The father may be largely indebted to them for rents and profits, for which he could have been held to account in a proper proceeding, and which may constitute a claim against his estate. The bill admits that the cotton was the property of their father, and only claims rent. For rent the complainants had no lien on the cotton removed and sold by the administrator, inasmuch as the necessary relation did not exist; whatever may have been their rights, if they or their guardian had attempted to hold their father to account as trustee, and claimed the entire cotton as the profits of lands held by him in trust for them.

The bill further seeks to hold the defendant liable, as surety on the bond of the administrator, for the amount of exemption of personal property, to which they were entitled, and of which, as complainants claim, they were deprived by the conduct of the administrator. The right to the exemption vested immediately on the death of their father, and is absolute and unqualified; but no title vests to any specific property, until it is selected, and set apart from the balance of the estate. The right to the exemption is lost, or waived, by a failure to select in due time. We have held, that the claim must be asserted before the property is sold under an order of the court, or before it is subjected to administration for the payment of

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debts, or for distribution. So long as there remains any personal property unsold or unadministered, the selection may be made; but, after the property is sold, there is no subject-matter to which the exemption can attach.—*Mitchum v. Moore*, 73 Ala. 542; *Little v. McPherson*, 76 Ala. 552; *Henderson v. Tucker*, 70 Ala. 381.

In the present case, the guardian of complainants, in September, 1879, selected, as exempt for them, the personal property which had been then appraised, amounting in value to about four hundred dollars; which selection was permitted by the administrator. Other personal property of the estate was sold in January, 1880. The estate was declared insolvent in June, 1880; and in July thereafter, the administrator made a settlement of his accounts as such. On this settlement, the administrator accounted for the sales of the personal property, including the cotton. The complainants were represented by a guardian *ad litem*. No person having been nominated by the creditors, the former administrator was continued, and acted as such until his death in 1881. No claim for any further exemption was ever asserted, until the present bill was filed, in August, 1885; and the bill does not allege that there was any personal property of the estate, other than that allowed as exempt, and what was accounted for on the settlement.

As a general rule, *laches* will not be imputed to an infant, and his rights are not waived by a failure to assert them promptly; though they may, under some circumstances, be lost by the failure of their guardian, to whose personal liability they must resort, in such cases, for indemnity. The statute does not contemplate that the infants shall make the selection. Their guardian is the person designated and authorized, and on him the duty is imposed. The excuse given for not selecting property as exempt, in addition to that already allowed, is, that the administrator did not return an inventory of the other personal property from which they could select; and for the loss sustained by this breach of duty, they claim that his surety is liable. The theory of the excuse seems to be, that a selection is dependent on the property being inventoried. It is true, the statute contemplates that all the personal property, except the articles specially exempted, may be inventoried; and that the selection may be made from the property described in the inventory. But an inventory of the property is not essential to a selection, either by the guardian, or by persons appointed by the judge. A selection may be made before administration of the estate is granted; the office of the selection being to individualize the property.—*Mitchum v. Moore*, *supra*. And the judge of probate can appoint disinterested persons to make a selection, before the return of an inventory. If a selec-



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tion could not have been made until an inventory was returned, there would be plausible ground on which to rest the excuse. If an inventory was necessary to inform the guardian of the personal property, and enable him to make a selection intelligently, the statute armed him with power to compel an inventory, or remove the administrator; and in a proper case, a court of equity, if the powers of the Probate Court were inadequate, would interpose, and make the right to select available. *Loeb v. Richardson*, 74 Ala. 311. There is no allegation in the bill, that the guardian was not informed of the personal property of the estate; and in the absence of such allegation, the inference must be indulged, that he knew of the cotton, which had been gathered and removed from the lands of the complainants by the administrator, and of the other personal property. There was no legal impediment to the exercise of the right of selection, or to an appointment by the judge of probate.

In *Little v. McPherson*, 76 Ala. 552, where we said the personal representative can not defeat the right to exemption by converting the choses in action into money, or using the assets in payment of debts before the expiration of the time allowed creditors to present their claims, the estate had not been declared insolvent, and the property selected remained *in specie*. Where the estate is declared insolvent, the administrator is required by statute to make a settlement of his accounts on a day named, not less than thirty, nor more than sixty days, from the declaration of insolvency. To permit such settlement to be made without asserting a claim of exemption, may be a waiver as to the administered assets. There is a difference between a defeat of the right of exemption by unauthorized or unrequired acts of the administrator, and by the failure of those entitled to assert the claim. No active duty is imposed upon the administrator to have a selection made. He may proceed with the due and legal administration of the estate, without delaying for a selection. His duty is passive—to permit a selection of property described in the inventory. Until there has been an effort or proposition to select, he is under no responsibility to those entitled, but who have failed to assert the right. To hold a surety liable on the allegations of the bill, for the amount of the exemption, would require him to compensate complainants for a loss sustained by the inaction of their guardian, and by the failure of the judge of probate to appoint disinterested persons to make a selection. If improper payments were made by the administrator, they should have been contested on his settlement. In the absence of fraud or collusion, or an undue advantage, the settlement is conclusive. We do not decide that the right to exemption

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is lost or waived, if there be any subject-matter to which it can attach. What we do decide is, that the surety is exonerated from liability by reason of the guardian having suffered the administrator to sell the personal property, to have the estate declared insolvent, make a settlement of his accounts, and continue to act until his death, without any effort to make a selection, a partial selection having already been made.

It is urged that the bill should be sustained, for the purpose of removing the administration into the Chancery Court. If such be the object of the bill, the administrator *de bonis non* of Hardin's estate is a necessary party. As the sufficiency of the bill for the purpose of removing the administration was not made before, nor passed on by the chancellor, a consideration of it would be premature. The chancellor did not dismiss the bill, but gave leave to amend. It may possibly be amended, so as to bring it within the rule; which requires a clear and strong case to justify the removal of the settlement of an insolvent estate into the Chancery Court—a case requiring equitable relief, which the Probate Court can not administer, by reason of want of equitable jurisdiction.—*Moore v. Winston*, 66 Ala. 296; *Shackelford v. Bankhead*, 72 Ala. 476.

Affirmed.

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### *Statutory Action in nature of Ejectment.*

1. *Rule as to production of best evidence.*—By the established rule, the best evidence the nature of the question admits of may be received, but not the best evidence the exigencies of the particular case admit of; and the inability of a party, through accident or misfortune, to adduce legal evidence, does not authorize the admission of illegal evidence.

2. *Sale of decedent's lands under probate decree; when title of heirs is divested.*—A sale of lands by an administrator, under an order of the Probate Court, is the act of the court; and no title passes to the purchaser, as against the heirs or devisees, until the sale is reported and confirmed, the purchase-money paid, and a conveyance executed under the order of the court.

3. *Adverse possession, as between administrator and heirs.*—When an administrator takes possession, in his representative capacity, of his intestate's lands, his possession is not adverse to the heirs, and the statute of limitations does not begin to run in his favor, as against them, until there is a public or notorious change in the nature of his holding; and the fact that he sold the lands under a probate decree, becoming himself the purchaser, does not render his subsequent possession adverse to the heirs, when it is not shown that the sale was ever reported and confirmed, and a conveyance executed to him under the order of the court,

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APPEAL from the Circuit Court of Barbour.

Tried before the Hon. H. D. CLAYTON.

This action was brought by Anne E. Hart, against H. M. Comer, to recover an undivided one-eighth interest in a house and lot in the town of Eufaula; and was commenced on the 10th October, 1883. The defendant pleaded, in short by consent, not guilty, the statute of limitations of ten years, and adverse possession for three years; and the cause was tried on issue joined on these pleas. The plaintiff was one of the eight children of John Hart, deceased, who died, intestate, in 1862, being seized and possessed of said premises at the time of his death; and the defendant claimed as a sub-purchaser from H. C. Hart, one of the children of said John Hart, who administered on his father's estate, and became himself the purchaser of the property, at a sale made by him, under an order of the Probate Court, in July, 1871. On the trial, as the bill of exceptions shows, the plaintiff proved that said H. C. Hart, after his appointment as administrator, "took possession of said lands as such administrator, and built the houses thereon; that said H. C. Hart died in June, 1883, without having filed any account, annual or final, for a settlement of his administration, and without resigning or being discharged; that there is now no administration on the estate of said John Hart, and that the annual rental of the entire premises sued for is \$400." This was the plaintiff's case.

"The defendant proved that, on the 8th May, 1871, on the petition of said H. C. Hart as administrator, the Probate Court of Barbour county granted an order directing a sale of the lands, the subject of this suit; that the proceedings in the matter of said order were regular and valid; that the land was exposed for sale on the 1st July, 1871, after due advertisement, and said H. C. Hart, the administrator, became the purchaser in his individual capacity; that said sale was fairly conducted, and the price bid was not greatly disproportionate to the real value of the land; and that the plaintiff was, at that time, more than twenty-one years of age. But defendant admitted, that no report of said sale was ever made to the Probate Court, or other proceedings of any kind had in or by said court in reference to said sale or purchase by said Hart, or that said Hart ever, so far as shown by the records of said court, did or performed any other act in reference to the settlement of the estate of said John Hart. The defendant proved, also, that said H. C. Hart mortgaged said lands, on the 3d September, 1877, to W. C. Oates; that said mortgage was foreclosed on the 25th January, 1879, under the power of sale therein contained, and the defendant became the purchaser at the sale; and that he had since been in possession under said purchase, claiming said



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land as his own, renting it out, paying the taxes, insuring the house in his own name, and keeping the property in repair. Defendant proved these facts by D. T. Shehan and A. A. Walker, who testified, also, that said sale by said H. C. Hart was made at public outcry in Eufaula, where plaintiff was then living; and said Shehan further testified to the same acts of said H. C. Hart, before as after said sale, in reference to said property. Defendant further proved by W. E. McCormick, who was the private book-keeper of said H. C. Hart, that up to the time of said sale, the rents, income and profits of said property were credited by him, under the instructions of said H. C. Hart, to the estate of said John Hart, deceased, and after said sale were passed to the individual account of said H. C. Hart; and defendant offered in evidence, also, the books kept by said witness, showing these facts. Defendant offered in evidence, also, the assessment books of Eufaula, which showed that said land was assessed, up to and during the year 1871, as the property of the estate of said John Hart, and afterwards as the property of said H. C. Hart, until he disposed of the same. The court admitted this testimony, but, when all the testimony was in, plaintiff's attorney inquired if the adverse possession set up in said H. C. Hart was referred to his holding under said purchase at his own sale as administrator, to which defendant's attorney replied that it was; and thereupon the court, on motion of the plaintiff, excluded from the jury the evidence of acts of ownership by said H. C. Hart and by said defendant, as tending to show adverse possession by them under said purchase by said Hart, and of acts of ownership by him prior to the execution of said mortgage on said property." To the exclusion of this evidence, and each part thereof, exceptions were duly reserved by the defendant.

The defendant claimed, and attempted to prove, that the purchase by said H. C. Hart at his own sale was ratified by the other heirs of said John Hart, all being of lawful age; that he accounted to them for their proportionate shares of the purchase-money, and of all other assets of the estate which had come to his hands, and that they had executed to him a deed reciting these facts; and he attempted to prove these facts by the testimony of J. L. Pugh, J. M. McKleroy, A. A. Walker, and S. H. Dent. Pugh testified, that he, as attorney for H. C. Hart, and at his request, had prepared such an instrument "in the early part of the year 1880," to be signed by the other heirs, and delivered it to the said H. C. Hart, but never saw it afterwards; and he stated its recitals and provisions, as written according to Hart's instructions. McKleroy testified, that he saw the instrument "in September, 1880," and critically examined it; that it was in Pugh's handwriting, "and purported

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to be signed by all the brothers and sisters of said H. C. Hart ;” and he stated its contents in substance as Pugh had. Walker testified, in substance, to the same facts stated by McKleroy. Dent testified that, in January, 1881, he being attorney for a building and loan association, from which H. C. Hart desired to borrow money on mortgage of the property, Hart showed him the instrument as evidencing his title to the property ; that it purported to be signed by all the heirs, and Anne E. Hart among them ; that he asked who she was, not knowing any one by that name, and was informed by Hart that it was his sister Lizzie, whom witness knew ; that he was not familiar with her handwriting, and did not know that the signature was hers ; that the instrument was dated in 1879, or 1880, and had never been recorded ; and that he took a mortgage from Hart on the faith of it. G. L. Comer, a witness for the defendant, who had been the administrator of said H. C. Hart’s estate, testified that he had made diligent search for the instrument among the papers of said Hart, and had not been able to find it, or any trace of it. “This being all the evidence in regard to said lost instrument and its execution, and its execution being denied, plaintiff objected to its (said lost instrument as established) being offered to the jury, because its execution had not been proved ; which objection the court sustained, but permitted the same to go to the jury under the plea of adverse possession ; and to this ruling the defendant excepted.”

“This being all the evidence, the court charged the jury, that they must, if they believed the evidence, find for the plaintiff, for an undivided one-eighth of the property, and for one-eighth of the rent from one year prior to the bringing of the suit ; to which charge the defendant excepted.”

The charges of the court, and the several rulings on evidence, to which exceptions were reserved, are now assigned as error.

G. L. COMER, for appellant.—(1.) The testimony offered, as to the execution and contents of the deed from the heirs of John Hart to H. C. Hart, ought to have been received. The deed was lost, and it had never been recorded ; the subscribing witnesses to it were not known, and the defendant had no object in withholding it. The testimony was, under the circumstances, the best evidence the nature of the case admitted of, and it ought to have been received.—*Shorter v. Sheppard*, 33 Ala. 648 ; *Jones v. Scott*, 2 Ala. 58 ; *Bennett v. Robinson*, 3 Stew. & P. 240 ; *Mordecai v. Beal*, 8 Porter, 529 ; *Rhodes v. Seibert*, 2 Barr, 18 ; *Kelsey v. Hamner*, 18 Conn. 311 ; *Sicard v. Davis*, 6 Peters, 124 ; *United States v. Reyburn*, 6 Peters, 352 ; *Minor v. Tillotson*, 7 Peters, 99 ; 1 Greenl.

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Ev. §§ 557-8, 572, 582-84. (2.) Hart becoming the purchaser at his own sale, which was for cash, the right to receive and the duty to pay became united in him, and the presumption of payment arises.—*McLane v. Spence*, 6 Ala. 894; *Childress v. Childress*, 3 Ala. 752; *Duffee v. Buchanan*, 8 Ala. 28; *Purdom v. Tipton*, 9 Ala. 914; *Ragland v. Calhoun's Adm'r*, 36 Ala. 611; *Ward v. Oates*, 42 Ala. 225. (3.) Plaintiff can not recover, without overcoming this presumption of payment at least.—*Walker v. Crawford*, 70 Ala. 567; *Tillman v. Spann*, 68 Ala. 102; *Phillips v. Adams*, 78 Ala. 225. (4.) After his purchase at his own sale, Hart claimed to be in possession in his own individual right; his possession was open, notorious, exclusive, and continued for more than twelve years; and his title became thereby perfected under the statute of limitations. *Maurry v. Mason*, 8 Porter, 211; *Nettles v. Nettles*, 67 Ala. 601; *Dothard v. Denson*, 72 Ala. 541; *Cooper v. Watson*, 73 Ala. 252; *Benje v. Creagh*, 21 Ala. 156; *Harrison v. Pool*, 16 Ala. 174; *Herbert v. Henderson*, 16 Ala. 581; *Johnson v. Johnson*, 5 Ala. 90; *James v. James*, 55 Ala. 530; *Brady v. Huff*, 75 Ala. 80; *Fielder v. Childs*, 73 Ala. 567; *Walker v. Crawford*, 70 Ala. 567; *Alexander v. Wheeler*, 69 Ala. 332; *State v. Connor*, 69 Ala. 212; *Tillman v. Spann*, 68 Ala. 102; *Wilson v. Glenn*, 68 Ala. 383; *Bonner v. Young*, 68 Ala. 35; *Baucum v. George*, 65 Ala. 268; *Clark v. Boorman*, 18 Wall. 508; *Badger v. Badger*, 2 Wall. 94; *Williams v. Watkins*, 3 Peters, 48; *Scott v. Haddock*, 11 Geo. 258; *Zeller v. Eckert*, 4 How. 289; *Ricard v. Williams*, 7 Wheat. 233; *McCarthy v. McCarthy*, 74 Ala. 546; *Smith v. Roberts*, 62 Ala. 86.

II. R. SHORTER, and J. M. WHITE, *contra*.—(1.) The offered testimony was wholly insufficient to prove the execution of the alleged deed, and was properly excluded from the jury on motion.—*Adams v. Shelby*, 10 Ala. 478; *Shorter v. Sheppard*, 33 Ala. 648; 1 Greenl. Ev., § 558, note; *Dixon v. Spence*, 1 Ala. 540; *Spears v. Cross*, 7 Porter, 437; *City Council v. Wright*, 72 Ala. 421. (2.) The sale was never reported to the Probate Court, and was never confirmed; the purchase-money was never paid, and no conveyance was ever executed to the purchaser under the order of the court. That no title passed to the purchaser, see *Wallace v. Hall*, 19 Ala. 367; *Dugger v. Tayloe*, 60 Ala. 504; *Watson v. Martin*, 75 Ala. 506; *Hutton v. Williams*, 35 Ala. 503. (3.) A presumption of payment arises, as against the administrator and his sureties, when he owes a debt to the estate; but the principle can not be invoked by the administrator himself, as against the heirs, for the purpose of divesting their title to land, which he has bought but never paid for. (4.) Adverse possession does not



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begin to run in favor of a purchaser, until he has paid the purchase-money.—*Ormond v. Martin*, 37 Ala. 598; *Morgan v. Casey*, 73 Ala. 276; *Dugger v. Tayloe*, 66 Ala. 444. (5.) No change of possession on the part of the administrator, or change in the character of his possession, and notice thereof to the heirs, having been shown, the statute of limitations never began to run in his favor.—*Cotten v. Thompson*, 25 Ala. 671; *Johnson v. Toulmin*, 18 Ala. 50.

STONE, C. J.—It is a mistaken view of the rule, when it is asserted that a suitor can produce evidence otherwise illegal, because through accident or misfortune he is unable to produce higher or better evidence. Many facts and circumstances are either insusceptible of direct proof, or are much more difficult of positive proof than other facts are. It is on this account that the rule has become established, to admit, not the best evidence the exigencies of the case admit of, but the best evidence which the *nature of the question* admits of.—1 Brick. Dig. 848, § 623; 1 Green. Ev. § 60; 1 Whar. Cir. Ev. § 82. The testimony of the witnesses Pugh, McKleroy and others, offered as proof of the execution and contents of the written instrument drawn by the former, for and at the request of H. C. Hart, appellant's intestate, was wholly illegal for the purpose offered, and was, for that reason, rightly ruled out by the court. The title to the property sued for being in John Hart at the time of his death, it descended immediately to his heirs, of whom the plaintiff in this action is one. She has, therefore, shown a *prima facie* right of recovery, and no legal title is shown to have vested in H. C. Hart, under whom appellant claims, under and by virtue of the purchase he made at administrator's sale. To have perfected his title under that purchase, the sale should have been reported to the Probate Court, the sale confirmed, purchase-money reported paid, order to make title granted, and title executed. None of these steps were taken; and the consequence is, the legal title remained, where the law had cast it, in the heirs of John Hart. In fact, it can not be affirmed that, in law, any sale has been made. Such sales are what are called judicial sales—sales by and under the authority of the court. They derive their force and efficacy, not from the auctioneer's hammer, or announcement of the highest and best bidder. Even the executory contract of purchase, if it may be so called, is imperfect and invalid, until it is reported and confirmed, though the bidder may bind himself, if proper steps are taken to avoid the statute of frauds.—*Perkins v. Winter*, 7 Ala. 855; *Wallace v. Hall*, 19 Ala. 367; *Hutton v. Williams*, 35 Ala. 503; *Doe, ex dem. v. Hardy*, 52 Ala. 291; *Landford v. Dunklin*, 71 Ala. 594, 606; *Mc-*

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*Cully v. Chapman*, 58 Ala. 325; *Dugger v. Tayloe*, 60 Ala. 504; *Tayloe v. Dugger*, 66 Ala. 444; *Cruikshank v. Luttrell*, 67 Ala. 318; *Watson v. Martin*, 75 Ala. 506.

The testimony shows that H. C. Hart became the administrator of John Hart, his deceased father, and, as such administrator, had possession of the property for many years after his appointment. Such possession is authorized by our statutes. *McCullough v. Wise*, 57 Ala. 623; *Brewton v. Watson*, 67 Ala. 121. His attempt to make sale being, as we have shown, no sale in fact, the parties must be regarded, in a court of law, as if no sale had been attempted. And having entered as administrator, there is nothing in this record to show a public or notorious change in the nature of his holding, or to convert it into an adverse possession, in whose favor the statute of limitations will run.—*McCarthy v. Nicrosi*, 72 Ala. 332; *McCarthy v. McCarthy*, 74 Ala. 596; 3 Wait's Ac. & Def. 450, 451. The statute could not, at most, begin to run, until H. C. Hart assumed to dispose of the entire property, if indeed it did until sale was made under the mortgage to Oates. This last question we need not decide, as the first happening of those events fails to give sufficient time for the limitation of ten years to perfect a bar.

Other questions have been argued, but we need not consider them.—*Morgan v. Casey*, 73 Ala. 222.

If H. C. Hart, or those claiming in his right, can show payment in fact of the purchase-money, or a sum equal to it, to or for the benefit of his co-heirs of the estate of John Hart, deceased, there may be relief for them in the Chancery Court. *McCullough v. Wise*, 57 Ala. 623; *Ganey v. Sikes*, 76 Ala. 421.

The appellants have shown nothing tending to prove a defense at law, and the judgment of the Circuit Court must be affirmed.

## **Louisville & Nashville Railroad Co. v. McGuire & Co.**

### *Action against Railroad Company as Common Carrier, for Lost Goods.*

1. *Proof of receipt of goods by carrier.*—In an action against a common carrier for the loss of goods, his receipt of the goods may be proved without producing a bill of lading, or accounting for the failure to produce it.

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2. *Entries on book by agent; admissibility as evidence against principal.* Entries on the books of the carrier, made by his authorized agent in the regular course of business, and at the time the goods are received, are admissible evidence against the carrier, as forming a part of the *res gestæ* of the fact of delivery.

3. *Liability of common carrier for loss or damage.*—A common carrier, receiving goods for transportation, is an insurer, except against the act of God or the public enemy, or the wrong or negligence of the party complaining; and is liable for the accidental loss of the goods by fire.

4. *Same; continues how long.*—In the absence of statutory regulations, the liability of a common carrier continues, after the goods have reached their destination, until the consignee has had a reasonable time to remove them; and after that time he is liable only as a warehouseman, or bailee for hire.

5. *Same; after demand and failure to deliver.*—When a carrier fails, without good excuse, to deliver the goods on demand after they have reached their destination, he continues to hold them as carrier, at his own risk and peril.

6. *Same; lien for charges, as excuse for failure to deliver.*—If the failure to deliver the goods, on demand of the consignee, is not placed on the ground of a lien for charges, or the non-payment thereof, the carrier can not set up such lien or non-payment in defense of a subsequent action for the loss of the goods.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by McGuire & Co., suing as partners, against the appellant as a common carrier, to recover damages for the loss of certain goods, which had been forwarded from Louisville, Kentucky, by the defendant's railroad, consigned to the plaintiffs at Birmingham; and which were destroyed by fire, on the night of November 14th, 1884, while in the defendant's depot at Birmingham, which was also destroyed by the fire. The goods consisted of "25 buckets of candy, 5 kegs of cider, 10 cases of lard, one kit of fish, 10 tubs of butter, and 5 gross of matches;" and they were shipped from Louisville on different days, as follows: the kegs of cider on the 22d October, the buckets of candy on the 1st November, the lard on the 10th November, and the butter on the 11th November; and were all received by the defendant, at its depot in Birmingham, within two, three or four days after the respective shipments. The only plea was the general issue, and, a jury being waived by consent, the case was submitted to the decision of the court "on the facts and the law."

On the trial, as appears from the bill of exceptions, the plaintiffs introduced on Cox as a witness, who was a clerk in the defendant's depot at Birmingham, "and asked him if he knew anything about the shipment of the goods, the loss of which was the foundation of this suit. It had been shown that plaintiffs had received bills of lading, and there was no evidence that they had been lost or mislaid. The defendant objected to this question, because the bills of lading would be



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better evidence of the shipment than the oral statements of the witness." The court overruled the objection, and allowed the witness to answer; to which the defendant duly excepted. During the progress of the trial, the bills of lading were produced by one of the plaintiffs, while testifying as a witness; and they were then placed in evidence by the defendant. The witness Cox, answering the question, "said that he knew nothing in relation to the matter, except as shown by the entries in the defendant's books at the depot in Birmingham;" and having produced the book, on request, he further testified," that it was his business to make the entries therein containing a statement of freight on its arrival; that some of the entries were made by himself, and he recognized the others to be in the handwriting of clerks under him, who acted by his directions in making such entries." On this evidence, the court allowed the entries to be read in evidence, showing the day on which the goods were received by the defendant at Louisville, and the day on which they arrived at the depot in Birmingham; and to this ruling the defendant also excepted. The entries showed that the cider was received at the depot in Birmingham on the 24th October, the candy on the 3d November, and the lard on the 14th November.

The plaintiffs then introduced as a witness one Moses Winsett, a negro drayman in their employment, who testified, in substance, that he was sent by plaintiffs, "on or about the 10th November, 1884," to the defendant's depot, for some candy and cider; that he saw Mr. Williams, defendant's agent having charge of that part of the business at the depot, and told him that he had been sent by plaintiffs for the candy and cider in the depot consigned to them; that Williams replied, "he could not then get the goods, because they were covered up by other goods;" that he was again sent to the depot for the goods, "on the 14th November," and, in reply to his demand, "Williams again refused to deliver them, because he said they were covered up by other goods." This witness further testified, on cross-examination, that he did not pay, nor offer to pay the freight on the goods, on either occasion when he demanded them, but that he saw one Roberts, who was in the plaintiffs' employment, pay the freight through a window at the depot; while one of the plaintiffs afterwards testified, that the freight had never been paid. Said Williams, defendant's agent, testified on behalf of defendant, "that he had no recollection of said drayman demanding the candy and cider of him at the depot; that he knows he did not refuse to deliver said goods to the drayman because they were covered up; that, on the contrary, they were not covered up by other goods; but that, if the drayman had demanded the goods of him, he could

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not have delivered them to him without the payment of the freight charges, except by a special permit from said Cox." It was admitted that the plaintiffs had never sent to the depot for either the butter or the lard; the latter having arrived at the depot on the morning of the 14th November, and the butter on the 12th. As to notice of the arrival of the goods at the depot, it was proved that plaintiffs were notified on the 1st November, of the arrival of the cider on the 24th October preceding; and on the 7th November, of the arrival of the candy on the 3d.

On all the evidence, the substance of which is above set out, the court rendered a verdict and judgment for the plaintiffs, for the value, as proved, of the lard, candy and cider, aggregating \$151.35; to which judgment the defendant excepted, and now assigns the same as error, together with the several rulings on evidence to which exceptions were reserved.

HEWITT, WALKER & PORTER, and THOS. G. JONES, for appellant.

MOUNTJOY & TOMLINSON, *contra*.

SOMERVILLE, J.—The receipt of goods by the defendant as common carrier was a fact which could be proved by any competent evidence, without producing the bills of lading. In such a case, parol evidence is as much primary as that which is written, the nature of such evidence failing to indicate on its face that any better remains behind or undisclosed.—1 Green. Ev. § 84; 1 Whart. Ev. § 77. If, moreover, it was otherwise, the error would have been cured by the subsequent production of the bills of lading during the progress of the trial.

The book entries were also admissible to show the fact of the receipt of the merchandise. They were made by the authorized agent of the railroad company, or under his direction, in due course of his agency, and the correctness of the entries was proved by the agent himself. This constituted such entries written admissions which formed a part of the *res gestæ* of the fact of delivery itself.—*Danner Land and Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184; 1 Green. Ev. § 113; 2 Whart. Ev. § 1131.

When goods are intrusted to a common carrier for transportation, he is liable for all loss or damage, except such as may be occasioned by the act of God, the public enemy, or by the wrong or negligence of the party complaining.—*A. G. S. R. Co. v. Little*, 71 Ala. 611; *South & North Ala. R. R. Co. v. Wood*, 66 Ala. 167; s. c., 41 Amer. Rep. 149. He becomes *pro hac vice*, and to this particular extent, an insurer, and such insurance clearly covers any accidental loss by fire.

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This liability continues until the consignee has had a reasonable time, after the arrival of the goods at the place of destination, within which to remove them. After this period of time has elapsed, the liability of the carrier as such is at an end, and he is thenceforth liable only as warehouseman, or keeper for hire. Such, at least, is the rule of the common law. *S. & N. Ala. R. R. Co. v. Wood, supra*; *Ala. & Tenn. Rivers Railroad Co. v. Kidd*, 35 Ala. 209. In certain cases, the statute now requires notice to consignees of the arrival of freight; and the principle may, to this extent, be modified. But this case is not affected by the statute, so far as we can discover from the proof made in the record.—Acts of Ala. 1878–79, p. 175–176.

It is a further principle, material to this case, that where a demand is made upon a railroad company, acting as a common carrier, for goods which have arrived at their destination, and there is a failure to deliver them, without sufficient excuse, the company must continue to hold the goods at their own peril, and not at that of the consignee.—*Meyer v. The Chicago & N. Railway Co.*, 24 Wis. 566; s. c., 1 Amer. Rep. 207; 2 Rorer on Railroads, pp. 1245–6; Wood's Railway Law, § 444.

Applying these principles to the present case, we discover no error in the conclusions reached by the City Court, either as to the facts or law. The lard was received on November 14th, 1884, and was destroyed by fire the same night. The liability of the defendant as to this merchandise was clearly that of a common carrier and not of a warehouseman, a reasonable time for removal not having elapsed at the time of its destruction. The company was an insurer against its loss by fire.

As to the candy and cider, destroyed at the same time, it is true the defendant was a mere warehouseman, or bailee for hire, in as much as the consignee had notice of their arrival, as well as ample time within which to have removed them. But, in our opinion, the testimony shows that a demand was twice made on the defendant's agent, and he failed to deliver these goods, without proper excuse—once on the tenth of November, and again on the fourteenth, the day preceding the night of the fire.

When these demands were made, the failure to deliver was not placed on the ground that the consignees owed the charges due for transportation. No mention was made of this amount, nor did the defendant claim that his neglect to deliver was on this account. Had he done so, the consignee may at once have paid the sum claimed. He could not, therefore, afterwards set up this lien, which was a mere right of retainer, as a defense to this action.

We find no error in the record, and the judgment of the City Court is affirmed.



## Wilhite v. Speakman.

### *Action for Statutory Penalty for Injuries to Animal Trespassing on Unclosed Land.*

1. *Unclosed lands; cattle running at large.*—In this State, except where the rule is changed by local statutes, unclosed lands are regarded as common of pastorage, over which cattle or stock may be suffered to run at large; and if the owner of the land desires to protect himself against damage, he must erect and maintain a lawful fence around them.

2. *Same; rights and liabilities of owner, in cases of trespassing cattle.*—Where lands are not inclosed by a lawful fence (Code, §§ 1586-7), the rights of the owner, as against cattle or stock running at large, are only defensive: he may have the trespassing animals estrayed, and may use all proper means to drive them out of his field, taking care to employ no unnecessary force; but, for any injury which is the natural or proximate consequence of a wrongful act on his part, outside of these defensive measures, he is liable to the statutory penalty of five times the amount of the injury.

3. *Same; case at bar.*—The plaintiff's horse having been caught by the defendant while trespassing in his field, which was not inclosed with a lawful fence, and tied with a rope to the limb of a tree, where he was found dead the next morning, the appearances indicating that he had been choked to death; the liability of the defendant to the statutory penalty does not depend on the question of negligence *vel non* in the treatment and care of the horse, but, his act being unlawful, on the question whether the death of the animal was the natural and proximate consequence thereof.

APPEAL from the Circuit Court of Cullman.

Tried before the Hon. JAMES AIKEN.

This action was brought by Jackson D. Wilhite, against William S. Speakman, to recover \$500, alleged to be five times the value of plaintiff's horse, which was killed by defendant while trespassing in his field; and was commenced on the 19th of September, 1883. The cause was tried on issue joined on the plea of not guilty, and resulted, under the rulings of the court, in a verdict and judgment for the defendant. On the trial, as appears from the bill of exceptions, it was proved that, on the morning of August 23, 1883, the defendant found the horse in his field, which was inclosed with a fence, caught him, and tied him with a bridle to a tree; that he returned to the horse about noon, took off the bridle, "and tied him with a rope doubled around his neck, to a swinging limb of a hickory tree in the field, where he was found dead the next morning, with the rope drawn tight around his neck, his neck so swollen

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that the rope was half hidden therein, and his tongue protruding from his mouth. The defendant offered evidence tending to show that he tied the rope in such a manner that it was loose when he tied it, and could not slip or tighten. There was no evidence that the horse, after being so tied up, was fed or watered by the defendant or any one else. The defendant offered evidence, also, tending to show that, at noon on that day, he sent word to the plaintiff, by his son, that his horse was tied up, and where it could be found; and that this message was repeated to plaintiff, on his return home at night, he having been absent from home during the day. It was proved, also, that the defendant and plaintiff each resided about half a mile from the said field; that the fence around the field was not over four feet in height, and in some two or three places not more than two feet and a half; and that corn, peas and oats were growing in the field.

On this evidence, the court charged the jury as follows: (1.) "Under the evidence in this case, if the defendant found the plaintiff's horse in his field, he had the right to catch and tie him up, if he did so in a careful and prudent manner." (2.) "That it was a question of negligence for the jury, and the whole question would be left to the jury, under the evidence, as to whether the defendant was guilty of negligence in the manner in which he tied up the horse, or in leaving him tied for the length of time shown by the evidence; and if they believed, from all the evidence, that the defendant was not guilty of any negligence, they must find a verdict for him."

The plaintiff duly excepted to each of these charges, and requested the following (with other) charges in writing: (1.) "If the jury believe the evidence, they must find in favor of the plaintiff." (2.) "Under the evidence, the fence inclosing the defendant's field was not a lawful fence." (3.) "Under the evidence, the act of the defendant in tying up the plaintiff's horse was a wrongful act; and if the jury believe, from all the evidence, that this wrongful act caused, or proximately contributed to the death or destruction of the horse, then they must find a verdict for the plaintiff." The court refused each of these charges, and the plaintiff excepted to their refusal.

The charges given, and the refusal of the charges asked, are now assigned as error.

GEO. H. PARKER, and HAMILL & LUSK, for the appellant, cited *M. & C. Railroad Co. v. Peacock*, 25 Ala. 229; *M. & O. Railroad Co. v. Williams*, 53 Ala. 595; *Pruitt v. Ellington*, 59 Ala. 454; *Smith v. Causey*, 22 Ala. 568; *Dickson v. Parker*, 3 How. Miss. 219; 34 Amer. Dec. 78; 49 Amer. Dec. 259.

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CLOPTON, J.—During recent years, many special statutes have been enacted, which prohibit the owner of animals to suffer them to go at large off his premises, within designated localities, and making him liable for all damages done thereby to the crops of another. The proprietor of the premises, on which the injury is done, may take possession of, and impound the trespassing animal, in the manner, and subject to the regulations, provided by the statutes. Otherwise than as thus enacted and regulated, the common-law doctrine, relating to trespasses by and upon animals, does not prevail in this State. The general statute in force, where not superseded by such special and local laws, definitely defines the height, closeness and character of the inclosures and fences.—Code, § 1586; *Acts* 1878-9, 75. The succeeding section, 1587, exempts the owner of the animal from liability for any trespass by breaking into lands, not inclosed as required; and further provides, that any person who injures, or destroys any such animal, shall be liable to the owner for five times the amount of the injury done. The statutes are founded on the doctrine, that in this State uninclosed lands are regarded as common of pasture, and that owners of stock have a right to suffer them to run at large. If the proprietors of land would protect themselves from damage, they must inclose them as required by statute. *Mo. & O. R. R. Co. v. Williams*, 53 Ala. 595; *M. & C. R. R. Co. v. Peacock*, 25 Ala. 229.

The court, without respect to the character and condition of the fence inclosing the field, instructed the jury, that if the defendant found the horse in his field, he had the right to catch him and tie him up, if he did so in a careful and prudent manner; that it was a question of negligence, and if the jury believed, from all the evidence, that the defendant was not guilty of negligence in the manner in which he tied the horse, nor in leaving him tied, they must find a verdict for him. There is no conflict in the evidence, that the defendant caught the horse in the morning, and using first a bridle, and afterwards a rope, tied him to a tree in the field, where he was left until the next day, when he was found dead. The instruction of the court can not be maintained, except on a supposed right of the defendant to distrain under the circumstances of the case. The right to distrain does not exist, when there is no liability on the plaintiff to compensate for the damage done to the crops. The owner of lands may dispense with a statutory inclosure, if he chooses, and leave his premises open to animals running at large. If an animal should break into his lands, in such case, his rights are only defensive; the same as against any other trespass, where there is no right to distrain. In a proper case, he may regularly estray the animal; and



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whether the owner be known or unknown, he may use such means as are requisite to turn or drive it outside the inclosure, taking due care to employ no unnecessary force. He may protect his premises against damage from the trespass, provided he does not injure or destroy the animal.

To entitle the plaintiff to recover, he need only show that the fence of the defendant was not constructed in substantial compliance with the statutory requirements, and that injury to the horse arose out of some act, done, commanded, or directed by the defendant.—*Smith v. Causey*, 22 Ala. 568. The declaration of the statute is, "if any person injures, or destroys any such animal, he is liable to the owner for five times the amount of the injury done." Force and injury are the gist of the action under the statute—not negligence. When the fence is insufficient, the statute does not exempt from liability, by reason of the negligence. Seizing the horse, and confining him in the field, if the fence was not a lawful one, was wrongful; and being the exercise of force, constituted a trespass, which fixed on the defendant a liability for the injury caused thereby. *Dickson v. Parker*, 34 Am. Dec. 78; *Mooney v. Maynard*, 18 Am. Dec. 699. Whenever there is an unjustifiable trespass, or the wrongful taking of the property of another, the law implies damage; and though no sensible injury be proved, the owner is entitled to recover some damages.—*Parker v. Mise*, 27 Ala. 480. If the fence of the defendant is found insufficient, under proper instructions from the court, on the other undisputed facts, he is liable for whatever injury was done, including the destruction of the horse, if its death was the natural and proximate consequence of the injurious acts of catching, tying and leaving the horse in the field. The manner of tying, and the time the horse was left tied in the field, were proper circumstances to be considered by the jury, not on the question of negligence, but in determining whether the death of the horse was the natural and proximate consequence of having thus been tied and left; and are material in ascertaining the amount of the injury done. If the horse died from other causes, the defendant would not be liable for its destruction, though he would be for any less injury. The failure of the plaintiff to go or send, on being informed, and untie the horse, does not operate to relieve the defendant from liability for his antecedent wrongful act.

An application of the foregoing rules to the several charges given and refused will sufficiently designate, for the purposes of another trial, which were improperly given, or improperly refused, without reviewing them *seriatim*.

Reversed and remanded.

## Murphree v. Bishop.

### *Bill in Equity for Reformation of Conveyance, and Injunction of Judgment in Action of Unlawful Detainer.*

1. *Injunction against judgment at law.*—A defendant in a judgment at law can not have equitable relief against it, because it is either erroneous or void; since, if void, it may be disregarded, or set aside on motion; and if erroneous, it may be revised on appeal.

2. *Injunction of action at law, pending suit for reformation of conveyance.*—When the purchaser of lands enters into possession under a conveyance in which they are misdescribed, and is afterwards sued in ejectment by his vendor, or the statutory action in the nature of ejectment, he may have the conveyance reformed, and the action at law enjoined pending the suit; but, if the vendor brings an action of unlawful detainer, in which title can not be inquired into (Code, § 3704), the purchaser can not enjoin the action or judgment while he seeks a reformation of the conveyance.

APPEAL from the Chancery Court of Blount.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 17th March, 1885, by Enoch Bishop, against Jesse E. Murphree; and prayed the reformation of a conveyance of lands executed by said Murphree to the complainant, on the ground that the lands intended to be conveyed were not correctly described in the deed, and an injunction of a judgment at law in an action of unlawful detainer, which said Murphree had recovered against the complainant for the lands. After answer filed, in which the alleged mistake was admitted, and an offer made to correct it, the defendant submitted a motion to dissolve the injunction, for want of equity in the bill, and on other grounds. The chancellor overruled the motion, and his decree to that effect is now assigned as error.

DICKINSON & WARD, and INZER & GREENE, for appellant. The bill can not be maintained on the ground of its asking a reformation of the conveyance; since the mistake in the description of the lands is admitted, and the defendant offers to correct it; and it does not appear that his attention was ever called to the mistake, or that a correction was asked.—1 Brick. Digest, 681, § 611, and cases there cited. Nor is any ground shown for enjoining the judgment in the action of unlawful detainer.—*Hamilton v. Adams*, 15 Ala. 506; *Norwood v.*

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*Kirby*, 70 Ala. 397; *Turnley v. Hanna*, 67 Ala. 101; *Abraham v. Watson*, 59 Ala. 524.

HAMILL & LUSK, *contra*, submitted a motion to dismiss the appeal; and, on the merits, relied on the case of *Robbins v. Battle-House Company*, 74 Ala. 499.

STONE, C. J.—The security for costs in this case sufficiently identifies the decretal order appealed from, and the motion to dismiss the appeal must be overruled.

Is there error in the chancellor's refusal to dissolve the injunction? The motion is based on the alleged want of equity in the bill. The grounds relied on for maintaining the injunction are two-fold. First: That three justices of the peace, instead of one, presided in the trial of unlawful detainer, and that for that reason the judgment rendered was void. If there be any thing in this objection, it was a mere error in the judgment, which could and would have been corrected, on motion, or on appeal. A void judgment may be disregarded, or may be set aside on motion. An erroneous judgment is corrected by appeal. Neither, standing alone, furnishes a subject for equitable cognizance.—*Glass v. Glass*, 76 Ala. 368; *Boynton v. The State*, 77 Ala. 29.

A second ground, on which the right to the injunction is rested, grows out of the alleged recovery in unlawful detainer. It is contended that the ruling in *Robbins v. Battle-House Company*, 74 Ala. 499, maintains the injunction granted in this case. In that case, Robbins claimed under a mere tenancy. As the contract of lease was drawn, he was a tenant at sufferance of a large part of the tenement. That tenancy was subject to be put an end to at any time by the landlord, without any reason therefor. If the lease was reformed, as claimed in the bill, then the tenant was in for a term not yet expired. The action of unlawful detainer was still pending on appeal in the Circuit Court, and it was necessary to the defense of that suit that the lease should be reformed before the appeal cause was tried. On that ground alone we held the injunction was improperly dissolved.

In the present case, the bill nowhere avers that Bishop was the tenant of Murphree. It avers the contrary, by setting up that Bishop purchased from Murphree, received a conveyance, and went into possession under such conveyance. It complains that the lands purchased were, through mistake, misdescribed in the conveyance; and it seeks a reformation of the deed, so as to make it embrace the lands, of which he had received the possession under his purchase. If, instead of unlawful detainer, Murphree had brought ejectment, or the statutory real



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action, then a reformation of the deed would have been necessary to Bishop's defense, for title would have been the issue in the cause. A bill setting forth such facts would have presented a proper case for an injunction. That is not this case. The bill avers that the suit and recovery were in unlawful detainer, and the injunction prayed and obtained was against the enforcement of that judgment. In such suit title can not be inquired into. A tenancy, or authorized possession, and its termination or forfeiture, are the conditions of its maintenance. Code of 1876, §§ 3697, 3704.

The deed from Murphree to Bishop, if corrected, could not aid the defense of the unlawful detainer suit; and the bill sets forth no equitable right to an injunction against the recovery complained of, or against its enforcement.—*Vancleve v. Wilson*, 73 Ala. 387. No other question is brought before us by this appeal.

The decree of the chancellor is reversed, and a decree here rendered, dissolving the injunction.

Reversed and rendered.

## Brown v. Freeman & Bynum.

*Action on Note given on Purchase of Patented Churn-Dasher.*

1. *Fraud in sale of chattels.*—On a sale of chattels, a misrepresentation of a material fact by the vendor, on which the purchaser has a right to rely, and on which he does in fact rely, as an inducement to the contract, is a fraud, and is available as a defense to an action for the purchase-money, or a separate cause of action in favor of the purchaser.

2. *Same; matters of opinion.*—A representation which is in the nature of an expressed opinion, does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances, it may often constitute a warranty.

3. *Same; question for jury.*—Whether the representation was intended as the statement of a fact, or as the mere expression of an opinion, is a question for the determination of the jury, when it does not involve the construction of a written instrument.

4. *Patent defects; examination by purchaser.*—Representations and warranties do not cover patent defects, such as are external and obvious on casual inspection; yet, except as to such defects, the purchaser may rely on the warranty, and is not bound to make any examination.

5. *Offer to restore or rescind.*—Before the purchaser can defeat an action for the price, in the absence of fraud or a warranty, he must offer to restore the goods; but he may set up, in defense of such action, fraud or want of consideration, without offering to restore the goods, or to rescind the contract.

[Brown v. Freeman & Bynum.]

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. JAMES E. COBB.

This action was brought by Freeman & Bynum, suing as late partners, against Lewis G. Brown and Preston Brown; was commenced on the 6th May, 1881, and was founded on the defendants' written obligation, or note under seal, in these words: "Twelve months after date, we, or either of us, promise to pay to S. B. Donaldson & P. G. McClure the sum of two hundred and fifty dollars, for value received of them in territory in the *Gibbs Patent Eureka Churn-dasher*; the said Donaldson & McClure agreeing to take stock, should we desire to put it in as payment on this note, at prices usually paid when paid in trade. Witness our hands and seals, this 29th June, 1879." The plaintiffs sued as the assignees of this writing. The defendants pleaded, in short by consent, want of consideration, failure of consideration, and fraud and misrepresentation; also, a special plea which set out in full the facts relied on as a defense, growing out of the defendants' purchase of the right to sell the patented churn-dasher in certain counties in Tennessee, the representations of said Donaldson and McClure as to the capacity and usefulness of the dasher, the falsity of these representations, and consequent failure and want of consideration; and another special plea of set-off, or recoupment of damages, on account of the defendants' loss of time, travelling expenses, and other moneys paid out in attempting to sell the dasher within the limits of the designated territory. Issue was joined on all of these pleas.

On the trial, the defendants reserved a bill of exceptions, which purports to set out all the evidence adduced; but it is unnecessary to state the evidence, as the only matters assigned as error in this court are certain charges given by the court at the instance of the plaintiffs, and the refusal of certain charges asked by the defendants.

The charges given at the instance of the plaintiffs were these: (1.) "If the jury believe, from the evidence, that Donaldson had with him, at the time of the execution by the defendants of the obligation sued on, a churn and dasher of the patent named, and that the defendants had an opportunity of testing by experiment the truth of any representations said to have been made by Donaldson at the time; then the jury should look to this circumstance, in connection with all the evidence in the case, in determining the character of such representations by Donaldson." (2.) "In determining whether the territory sold to Brown, and retained by him, is valuable or not, the jury may, in conjunction with all the evidence, look to the fact, if it be a fact, that the witness Keith readily sold twenty-two counties in Texas." (3.) "All that is required to make

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an invention useful, under the patent laws, is, that it should be capable of being applied to some practical and beneficial purpose, and not be frivolous, or injurious to the well-being or morals of society; and if it is useful in this sense, the degree of utility, or practical value, does not affect the validity of the patent." (4.) "In determining and weighing the inducement and representations of Donaldson, the jury may, in conjunction with all the evidence, look to the testimony of Donaldson, and the corroborating evidence of Keith, if there be such evidence, that butter could be made in between three and five minutes."

The defendants asked the following charges in writing:

"1. If Donaldson, at the time of the sale, represented to Brown that the churn-dasher had the capacity to produce butter in from three to five minutes, Brown had the right to rely on these representations; and if he did rely on them, and the representations were untrue, he was not under any obligation to test the dasher, and ascertain whether it had that capacity or not; that, the representations not being true, Brown was not under the duty of offering to return the interest sold him, nor of offering to rescind the contract of sale; that the failure to offer to return, or to rescind, will only render the defendants liable for the value of the interest sold; and if that is shown to be valueless, there can be no recovery.

"2. If the jury are satisfied, from the evidence, that the consideration of the note sued on was the sale of the right to sell, in certain counties in Tennessee, a churn-dasher sold by Donaldson to Lewis G. Brown as patented as described; and that Brown was induced to make the purchase, and to execute said note, by Donaldson's representations that the dasher would produce butter in from three to five minutes, and this representation was untrue; then there can be no recovery, beyond the value of the right sold; and if the right be valueless, there can be no recovery.

"3. The defendants were not under any obligation to offer to rescind the contract, or to return to their vendor the thing purchased, if the contract of purchase was induced by Donaldson's misrepresentations; that the only consequence of the failure to offer to rescind, or to return the thing purchased, is to render the defendants liable for the value of the thing purchased; and if it is not shown to have been of any value, there can be no recovery."

The court refused each of these charges as asked, and the defendants excepted to their refusal, as also to the several charges given at the instance of the plaintiffs; and they here assign these rulings as error.

R. C. BRICKELL, and J. E. BROWN, for the appellants, cited VOL. LXXIX.



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*Munroe v. Pritchett*, 16 Ala. 785; s. c., 22 Ala. 501; *Atwood v. Wright*, 29 Ala. 346; *Blackman v. Johnson*, 35 Ala. 252; *Sledge v. Scott*, 56 Ala. 202; *Perry v. Johnson*, 59 Ala. 648; *Nelson v. Wood*, 62 Ala. 175; *Tabor v. Peters*, 74 Ala. 90; Benjamin on Sales, §§ 898, 429, note; *Kornegay v. White*, 10 Ala. 933; *Milton v. Rowland*, 11 Ala. 732; *Marshall v. Wood*, 16 Ala. 812; *Jemison v. Woodruff*, 34 Ala. 143; *Holbrook v. Burt*, 22 Pick. 546.

HUMES, GORDON & SHEFFEY, and R. C. HUNT, *contra*, cited *Crown v. Carriger*, 66 Ala. 590; *Barnett v. Stanton*, 2 Ala. 188; *Collins v. Jackson*, 54 Mich. 186; *Reynolds v. Palmer*, 21 Fed. Rep. 433; *Holden v. Dakin*, 4 Johns. 421; *Thompson v. Ashton*, 14 Johns. 316; *Hurt v. Wright*, 17 Wend. 267; *Salisbury v. Stainer*, 19 Wend. 159; *Hyatt v. Boyle*, 5 Gill & J. 110; 8 Blackf. 516; *Barnard v. Kellogg*, 10 Wall. 383; *Hight v. Bacon*, 126 Mass. 10; *Davis v. Betz*, 66 Ala. 208; *Nash v. Lull*, 102 Mass. 62.

SOMERVILLE, J.—If a vendor of chattels misrepresents a material *fact*, at the time of, or pending the negotiation for the sale, on which the purchaser has the right to rely, and in fact relies as an inducement to the trade, this is a fraud, which will furnish a ground of defense to an action for the purchase-money, or even a cause of action in favor of the purchaser, as the case may be.—*Tabor v. Peters*, 74 Ala. 90; *Sledge v. Scott*, 56 Ala. 202; Benj. on Sales, 3d Ed., § 454.

To constitute a representation which is in the nature of an expressed *opinion*, a ground of fraud, it must be shown to have been knowingly false, made with intent to deceive, and to have been accepted and relied on as true. Under these circumstances, a mere opinion may often also constitute a warranty.—*Wilcox v. Henderson*, 64 Ala. 535; *Tabor v. Peters*, *supra*; 1 Whar. Contr. § 259.

Where the matter affirmed is one of fact, as contradistinguished from mere opinion, it may constitute a fraud, although the vendor at the time had no knowledge of its falsity. The gist of the liability is, that he has affirmed as fact what he did not know to be true, and he or another has thereby profited by it, to the prejudice of one whom he has deceived.—*Perry v. Johnson*, 59 Ala. 648; *Blackman v. Johnson*, 35 Ala. 252; *Munroe v. Pritchett*, 16 Ala. 785. As observed by Mr. Parsons, “material misrepresentations, which go to the substance of a contract, avoid that contract, whether they are caused by mistake, and occur wholly without fault, or are designed and fraudulent.”—2 Parsons Contr. \*786.

It is often a matter of difficulty, to decide whether a repre-

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sensation is intended as the statement of a fact, or of an opinion. This subject is fully discussed in the case of *Tabor v. Peters*, 74 Ala. 90, 96, and we need not add any thing at length to what is said there. When the question is one of doubt, and does not involve the construction of a written instrument, it should always be referred to the jury for their determination; the proper inquiry being, in what sense the assertion was intended and mutually understood.—*Bradford v. Bush*, 10 Ala. 386; *Ricks v. Dillahunt*, 8 Port. 134; *Sledge v. Scott*, 56 Ala. 202; 2 Add. on Contr. (Amer. Ed.), § 625, note 1; Story on Contr. § 511.

While it is true, as said in *Tabor v. Peters*, *supra*, that warranties and representations are never construed to cover defects which, being external and visible, are obvious to the purchaser upon casual inspection with the eye, or, as described by Mr. Addison, “those manifest and visible defects which were obvious to all observers;” yet, with the exception of such defects, where a warranty is given, the purchaser may rely on the positive representation or assurance embodied in it, and is not bound to make an examination, or even to prosecute any further inquiry on this particular subject.—2 Add. Contr. (Amer. Ed.), § 628; Benj. on Sales, § 429, note c. The main purpose of a warranty is often to excuse examination, and render inquiry unnecessary; and it is only in the absence of such protection that these precautions are required.—*Tabor v. Peters*, 74 Ala. 90, 98, *supra*.

Where the defense of fraud, or want of consideration, is set up in a suit for the purchase-money, it is not necessary for the defendant to offer to rescind the contract of sale, or to return the thing purchased, before he can be permitted to give in evidence, in reduction of damages, a fraudulent representation made by the vendor, or a breach of warranty. Such is the modern, and, in our opinion, the better view, except where the subject of sale is real estate, when a different rule is held to prevail. The purchaser may elect to rescind within a reasonable time, and return the subject-matter of sale; or he may retain it, and avail himself of the damage he has suffered, either by bringing his cross-action for the fraud or breach of warranty, as the case may be, or, if he be sued for the purchase-money, may prove the real value of the thing purchased, and abate the recovery *pro tanto*. This is the later rule of the American courts, adopted to avoid an unnecessary circuitry of action, although the English cases, no doubt, hold to the contrary doctrine.—2 Greenl. Ev., § 136; *Harrington v. Strathan*, 22 Pick. 510; *Hills v. Bannister*, 8 Cow. 32; Benj. on Sales, § 898; *Perry v. Johnson*, 59 Ala. 648; *Marshall v. Wood*, 16 Ala. 806; *Jemison v. Woodruff*, 34 Ala. 143. In the ab-

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sence of warranty or fraud, the buyer, of course, must offer to return goods, which are defective, or not conformable to order, or he will ordinarily be bound to pay for them the contract price.—*Gibson v. Bingham*, 5 Amer. Rep. 589. In this State, as far back as 1831, it was held in *Peden v. Moore*, 1 Stew. & Port. 71, that whenever a defendant can maintain a cross action for damages, based on a partial failure of consideration in the goods purchased by him, this would be available as a defense, in reduction of the sum sought to be recovered.

The rulings of the court were clearly in conflict with one or more of the foregoing rules; and the judgment is reversed, and the cause remanded.

## Rose v. Gunn.

### *Bill in Equity by Partnership Creditor, against Administrators and Heirs of Deceased Partners.*

1. *Rights of surviving partner.*—After the dissolution of a partnership by the death of one of the members, the survivor can not bind the estate of the deceased, by any note, acknowledgment, or admission, though he may bind himself individually, and thereby authorize a partnership creditor to pursue the partnership assets in his hands; and on a subsequent settlement by him with the personal representative of the deceased, it is incumbent on him to show that the debts, to the payment of which he applied the partnership assets, were the debts of the partnership.

2. *Partnership creditor, proceeding against estate of deceased partner.*—When a creditor seeks to subject the estate of a deceased partner to the payment of an alleged partnership debt, he must show that it was contracted by the partnership during its existence, and it is not sufficient to prove a written acknowledgment by the survivor, the institution of an action at law against him, and the recovery of a judgment against his personal representative.

3. *Rights and remedies of partnership creditors.*—A partnership creditor, as such, has no lien on the partnership assets, though the lien of the surviving partner may, in a proper case, be made available in his favor; yet, if the surviving partner transfers the partnership effects to the personal representative of the deceased, in settlement of the partnership matters between them, this lien is extinguished, and there is none to which a partnership creditor can be subrogated.

4. *Same.*—Although a partnership creditor has no remedy against the partnership effects in the hands of the personal representative and heirs of the deceased partner, to whom they have been transferred by the survivor; yet he may maintain an action at law against the personal representative, or a bill in equity to enforce payment out of the estate of the deceased partner.

APPEAL from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.



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The bill in this case was filed on the 29th of September, 1881, by J. J. Rose, claiming to be a creditor of the late partnership of Gunn & Watts, which was composed of Joseph F. Gunn and W. T. Watts, against the personal representatives and heirs of said Gunn and Watts, with other persons; and sought to enforce payment of the complainant's debt out of certain moneys and property in the hands of the defendants, which was claimed to be liable to it.

The firm of Gunn & Watts carried on a mercantile business at Hillsboro, in said county, and was dissolved in 1872, or 1873, by the death of said Gunn, on whose estate letters of administration were granted, soon after his death, to Jackson Gunn, his brother. W. T. Watts, as surviving partner, continued in possession of the assets of the firm, and transferred to said Jackson Gunn, after his appointment as administrator, notes and accounts belonging to the firm, on which said administrator collected about \$900. The complainant, having had business dealings with the firm of Gunn & Watts, claimed that the firm was indebted to him in the sum of about \$500; and on the 5th March, 1875, he instituted an action at law against said Watts, as the surviving partner. The cause of action, as described in the complaint, was \$500.55, "due by said defendant's acknowledgment in writing, signed by him on 27th December, 1874, with interest thereon;" also, the same sum, "due by account stated between plaintiff and defendant on the 27th December, 1874." The cause was submitted to arbitration, but no entry of record was made showing the submission. The death of W. T. Watts was afterwards suggested, and the cause was revived against James D. Watts as his administrator; and at a subsequent term, in September, 1879, the arbitrators having submitted their award in favor of the plaintiff, for \$362, judgment was rendered in his favor for that sum, against said James D. Watts, as administrator. On this judgment an execution was issued, which was returned "No property found;" and the bill alleged that the estate of said W. T. Watts was insolvent, that said James D. Watts was insolvent, and that the sureties on his official bond as administrator were worthless.

The firm of Gunn & Watts owned the store-house in which their business was carried on; and in March, 1880, said Jackson Gunn, as administrator, filed his petition in the Probate Court, asking an order to sell this house and lot for the purpose of making an equitable division or partition between the estates of the two deceased partners. The administrator of the estate of said W. T. Watts, his widow and children, were made defendants to this petition. The order of sale was granted, as prayed, and commissioners were appointed to make

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the sale. The sale was made, said Jackson Gunn becoming the purchaser, at the price of \$340; was reported to the court, and by it confirmed. One half of the purchase-money was paid in cash, and the purchaser gave his note for the residue, with sureties, payable January 1, 1881. The commissioners were made defendants to the bill, which sought to enjoin them from paying over the money in their hands, or collecting the note when due, and to appropriate the money to the complainant's judgment. It was alleged, also, that the partnership of Gunn & Watts owed no other debt than that due to the complainant, and was not insolvent, but that its only assets were the moneys arising from the sale of the store-house and lot, and the moneys which Jackson Gunn had collected as administrator, on the notes and accounts transferred to him by said W. T. Watts, and which he had paid over to the widow and children of his intestate; and the bill prayed that these moneys might be subjected to the payment of the complainant's debt.

There was a demurrer to the bill, assigning several specific grounds of demurrer, and also a motion to dismiss for want of equity; each of which was overruled and refused by the chancellor. But, on final hearing on pleadings and proof, he dismissed the bill; and his decree is now assigned in error.

CABANISS & WARD, for appellant.—(1.) The court had jurisdiction to enforce payment of the partnership debt, out of the partnership assets disbursed.—*Waldron v. Simmons*, 28 Ala. 629. (2.) The distribution of the partnership assets, without payment of the partnership debts, was, at least constructively, a fraudulent distribution of them; and a partnership creditor has the right to pursue them in equity under a creditor's bill. (3.) The surviving partner represented the partnership, but his administrator did not.—*Parsons on Partnership*, 447. In *Bartlett & Waring v. Gayle*, 6 Ala. 305, the contest was between purchasers of partnership property after dissolution—one under a deed of trust executed by the surviving partner, to secure payment of a note given by him for a partnership debt; and the other under an execution on a judgment against the surviving partner, founded on a partnership debt. Sale under the execution was enjoined by a stranger to the judgment, and the injunction was dissolved. The question was, whether the injunction suspended the lien, and thereby gave priority to the deed of trust, which was executed after the rendition of the judgment. The court held that it did not, and gave priority to the judgment lien, because it was the older; but no doubt was intimated as to the validity either of the deed of trust or of the judgment. (4.) The statute of limitations can not affect the complainant's right to have his debt

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paid out of the partnership assets improperly distributed to Gunn's administrator.—*Espy v. Comer*, 76 Ala. 501, citing 7 Paige, 26; 12 N. H. 461; 32 N. H. 167; 5 Gray, 106.

W. P. CHITWOOD, *contra*.—(1.) The complainant's judgment was not a partnership debt. After the dissolution of a partnership, one partner can not renew a promissory note by signing the partnership name, and thereby bind the other partners. After dissolution, the authority of one partner to bind another ceases.—*Lang's Heirs v. Waring*, 17 Ala. 156; *Cunningham v. Bragg & Co.*, 37 Ala. 437; *Myatts & Moore v. Bell*, 41 Ala. 231; *Jeffries v. Castleman*, 75 Ala. 262; *Espy v. Comer*, 76 Ala. 501. (2.) The original account against the partnership, on which the judgment was founded, is barred by the statute of limitations; and the statute is pleaded. (3.) The complainant had no lien, as a partnership creditor, on the partnership assets; and the division of the assets between the survivor and the administrator of the deceased partner, before the bill was filed, is fatal to the relief sought.—*Evans v. Winston*, 74 Ala. 349; *Hart v. Clark*, 54 Ala. 494; *Mayer v. Clark*, 40 Ala. 259.

CLOPTON, J.—The partnership of Gunn & Watts was dissolved by the death of Gunn, which occurred about April, 1873. After dissolution by death, the surviving partner has no authority to make any note, acknowledgment or admission, that will bind the estate of the deceased partner. Having the title and the management of the partnership effects, for the purpose of settling its affairs, the surviving partner may make an admission which will bind him individually, and authorize the admitted creditor to pursue the partnership property in his hands. But, in a settlement with the personal representative of the deceased partner, it is incumbent upon the survivor to show that the debts, to the payment of which he has applied the assets, are proper debts of the partnership; and if the creditor seeks to subject the estate of the deceased partner, he must establish a debt contracted by the partnership during its existence.—*Cunningham v. Bragg*, 37 Ala. 436; *Myatt v. Bell*, 41 Ala. 222; *Jeffries v. Castleman*, 75 Ala. 262.

The evidence offered to prove the claim of complainant consists of a written acknowledgment of the surviving partner, the suit instituted against him as such, the award of the arbitrators to whom the matter of indebtedness was referred pending the suit, and the subsequent judgment against the personal representative, the surviving partner having died during the pendency of the suit. The evidence may be sufficient to establish a claim, binding on the surviving partner; but the present is a new, distinct, and original proceeding against



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a new party, and, as against such new party, the complainant's debt must be proved in the same manner as if there had been no admissions by the surviving partner, nor judgment against him.—*Moore v. Southwick*, 2 Por. 351.

It appears that the surviving partner, during his life-time, turned over a portion of the partnership assets to the administrator of Gunn, as the amount to which his estate was entitled. It is insisted, that the complainant, having established his debt against the surviving partner, is entitled to subject the effects thus turned over, to its payment. The title to such relief can be based only on the theory, that the complainant has a lien, which a court of equity will enforce. Though the lien, which the partners themselves have, may be made available in favor of a creditor, in a proper case, a partnership creditor, as such, has no lien. One partner may sell the firm property to his co-partner, and the sale, if *bona fide*, vests the exclusive title in him. If, in settlement of the partnership matters, and of his liability to account, the surviving partner transfers partnership effects to the administrator of the deceased partner, his lien is extinguished, and there is none to which a creditor can be subrogated.—*Mayer v. Clark*, 40 Ala. 259; *Reese & Heylin v. Bradford*, 13 Ala. 837. While the assets remain undisposed of by the surviving partner, they may be utilized in paying the partnership debts; but, when he has disposed of them, whether to a third person, or to the representative of the deceased partner in satisfaction of his liability, the exclusive title vests in his transferee. An execution, issued on a judgment against the personal representative of the surviving partner, acquires no lien on partnership effects disposed of by him in his life-time.

The complainant having no lien, either as a partnership creditor, or by virtue of his execution, his remedy is a suit at law against the personal representative of the deceased partner, as authorized by statute, or a bill invoking the exercise of the original jurisdiction of a court of equity, to enforce the payment of a partnership debt out of the estate of a deceased partner.—*Waldron v. Simmons*, 28 Ala. 629. In either case, the title to a recovery must be founded on the personal liability of the deceased partner, and an original indebtedness, contracted by the partnership during its existence, must be proved. The court will not pursue partnership effects, turned over to the administrator of the deceased partner as his share thereof, and subject them to the payment of a debt, only established by the admissions of the surviving partner after the dissolution. Though a surviving partner may, by force of his title and right to possession, recover from the administrator of a deceased partner partnership property, which was in the hands of the

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decedent at the time of his death ; when a creditor seeks to subject such property, by direct proceeding against the personal representative, he must prove his debt by the same kind of evidence necessary to subject the individual estate of the deceased partner. The proof, shown by the record, did not authorize a recovery against the administrator or heirs of the deceased partner.

The store-house and lot was partnership property. The complainant having established his debt as against the surviving partner, and having reduced it to judgment against his personal representative, and his estate being insolvent, is entitled to subject Watts' share of the undistributed proceeds of the sale of the store-house and lot.

The decree of the chancellor is reversed, and a decree will be here rendered, dismissing the bill as to the administrator and heirs and distributees of Gunn, and ordering a reference to the register to ascertain the amount of the proceeds of the sale of the store-house and lot undistributed, and W. T. Watts' share thereof.

Reversed and rendered.

## **Watson v. Prestwood & Fletcher.**

### *Statutory Action in nature of Ejectment.*

1. *When administrator may maintain action.*—An administrator may maintain ejectment, or the statutory action in the nature of ejectment, to recover lands of which his intestate was seized of the legal title at the time of his death, against one who does not show a termination of that title, or a better title in himself.

2. *Sale of sixteenth-section lands; title of purchaser.*—A certificate for the purchase of lands belonging to the sixteenth section (Code, § 988) conveys the legal title to the purchaser, subject to be defeated on the happening of any of the contingencies which, by the terms of the statute, cause a forfeiture and reversion to the State.

3. *Same; rights of administrator, as against assignee of widow.*—On the death of the purchaser, while in possession under his certificate, his widow has no authority, as such, to indorse or assign the certificate to another person ; and his administrator may recover the lands in ejectment against her assignee, or a sub-purchaser from him, notwithstanding the issue of a patent to the assignee.

APPEAL from the Circuit Court of Covington.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by E. Watson, as the administrator of the estate of R. E. Jordan, deceased, against J. A. Prest-

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wood and A. J. Fletcher, to recover a tract of land containing 640 acres, which was described as the sixteenth section of township three (3), range fifteen (15); and was commenced on the 12th January, 1885. The cause was tried on issue joined on the plea of not guilty, and the following facts were admitted: "R. E. Jordan, plaintiff's intestate, bought said land in 18—, at a sale made by the trustees of said township, and gave his notes for the purchase-money, with proper security, and conditioned as required by law; and said trustees gave him a certificate of purchase, as authorized by law. Under said purchase, said Jordan had said land surveyed, built a hog-pen on it, at which he fed his hogs up to the time of his death, went frequently on it, claimed it as his own, exercised acts of ownership over it, kept other persons off, sold timber from it, and had a raft of timber cut, which was remaining on the land when he died. Said lands were wild, and valuable only for the timber. Said Jordan lived, at the time of his death, on another tract of land containing 320 acres, which did not adjoin said sixteenth section, but was distant one mile and a half, and entirely disconnected from it. Before his death, said Jordan had paid several of the purchase-money notes for said land; and he died in said county, without a will, in 18—, leaving a widow. Letters of administration on said Jordan's estate were granted to plaintiff, by the Probate Court of said county, in September, 1875. After said Jordan's death, the widow remained on the homestead, never made any improvements on said sixteenth section, and never set up any claim to it except as said Jordan's widow; and as such widow she had possession of said certificate of purchase. One Cooper went to see her, at her home, and purchased said sixteenth section from her; and she transferred said certificate of purchase to him, in September, 1875. None of the heirs of said Jordan, except the widow, joined in the assignment of said certificate to said Cooper; and a patent was afterwards issued to him on the assignment of said certificate by the widow alone. Cooper was in possession of said land when he received the patent, and he afterwards sold and conveyed, with the usual covenants of warranty, to one Whitehead, who took possession, and afterwards conveyed by deed to the defendants, who were in possession at the commencement of the suit."

The patent to Cooper purported to be made to him "as assignee of the heirs of R. E. Jordan," and recited full payment of the purchase-money. On this evidence, the court charged the jury, that they must find for the defendants, if they believed the evidence. The plaintiff excepted to this charge, and he here assigns it as error.



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J. E. P. FLOURNOY, for appellant.

STONE, C. J.—There can be no question that, if Jordan, plaintiff's intestate, was seized of a legal title to the lands sued for, at the time of his death, then Watson, his administrator, can maintain ejectment for their recovery, against any one who does not show a termination of such title, or a better title in himself.—*McCullough v. Wise*, 57 Ala. 623; *Brewton v. Watson*, 67 Ala. 121. The lands sued for are a sixteenth section, which Jordan had purchased in his life-time, and of which purchase he held a certificate, issued under section 987 of the Code. Section 988 of the Code provides, that "such certificate conveys to the person therein named, his heirs or assigns, a conditional estate in fee, to become absolute on the payment of the purchase-money and interest; and which reverts to the State, for the uses originally granted, in the following cases: 1. When all the notes have become due, and the makers have left the State, or died insolvent. 2. When a recovery on such notes is defeated, by any defense avoiding the contract of sale. 3. When a recovery is had against all the makers, and execution has been returned 'no property,' by the proper officer of the county in which the township lies; or when judgment is had, and execution returned against any one or more of such makers 'no property,' the others having left the State, or died insolvent."

The present suit was tried on an agreed statement of facts, and it fails to set forth any one of the grounds, for which the statute declares the lands shall revert to the State. It does set forth that Jordan in his life-time paid several of the notes.

The main inquiry in this case is, whether, under the statute, the certificate shown to have been issued to Jordan, clothed him with the legal title, with condition of defeasance, or reversion on the subsequent happening of one of the enumerated events, on which the statute declares the land shall revert; or whether the payment of the purchase-money notes was made a condition precedent to the vesting of title. The phraseology employed forces us to adopt the former of these alternative propositions. There could properly be no reversion, unless title had first passed out of the grantor. The whole framework of the statute evidently contemplates that, as soon as the purchase-money notes are given and approved, and a certificate of purchase is issued, the purchaser shall take possession and occupy as owner; and that his possession can not be disturbed, so long as he observes and performs the obligations he takes upon himself by the purchase. It is equally manifest, that the legislative policy was to relieve the State of expense and delay in regaining control and ownership of the land, held as it was

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and is in trust for educational purposes, if the purchaser, either intentionally or otherwise, suffered any one of the enumerated causes of forfeiture and reversion to supervene. We hold, that the plaintiff, under the agreed statement of facts, made a *prima facie* case for recovery.

The defense rests on the State's patent, issued to Cooper, on the strength of the indorsement of the certificate of purchase, made by Jordan's widow to him, Cooper. There is no attempt to show any authority in her to make the indorsement, other than the fact that she was the widow of Jordan, the purchaser. That gave her no such authority; and this case must be treated as if no attempt had been made to connect Cooper and the patent he obtained with Jordan's purchase.

We have stated that the present record discloses neither of the grounds which the statute declares shall operate a forfeiture of the purchase, and a reversion of the lands to the State. It follows that, under the facts shown in this record, the State had no authority to make other disposition of the land, and the patent issued to Cooper is invalid and inoperative against Jordan's heirs and estate, because nothing is shown to connect them with it, nor to conclude them by it.—*Saltmarsh v. Crommelin*, 24 Ala. 347; *Stephens v. Westwood*, 25 Ala. 716; *Bates v. Herron*, 35 Ala. 117; *Hallett v. Eslava*, 3 S. & P. 105; *Stephens v. Westwood*, 20 Ala. 275; *Johnson v. McGehee*, 1 Ala. 186. The *prima facie* case made by the certificate of purchase was not overcome, and the Circuit Court erred in the charge given to the jury.

Reversed and remanded.

## Holifield v. Robinson.

### *Bill in Equity to enforce payment of Legacy in Trust.*

1. *Bequest to county, in trust for preservation of private burial-place.* Neither the county as a corporation, nor the court of county commissioners, has power to take a bequest in perpetuity, in trust to lend or invest the money, and to appropriate the annual interest to the repair and preservation of the private burial-ground of the testatrix and her family.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 2d June, 1885, in the name of Chambers county, the judge of probate, and the sev-

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eral county commissioners, in their official capacity, against Joseph A. Holifield, as the executor of the last will and testament of Mrs. Mary F. McLemore, deceased, and sought to enforce the payment of a legacy. Mrs. McLemore died in May, 1882, and her last will and testament was duly proved and admitted to probate on the 24th August following, letters testamentary being granted to said Holifield on the same day. The 11th item of the will, under which the legacy was claimed by the complainants, was in these words: "I give and bequeath to the commissioners of roads and revenue of the county of Chambers and State of Alabama, and their successors in office, or to such authority as may control the finances of said county, the sum of one thousand dollars (\$1,000), to be held in perpetuity in trust, and direct that the legal interest arising from the said sum of one thousand dollars be expended annually in the repair, preservation and neat keeping of the grounds and monuments of myself, my first husband, William George, my second husband, Charles McLemore, and my father and mother, all being and will be buried in said county of Chambers; and I earnestly entreat that this bequest and trust will be forever faithfully executed; said sum of one thousand dollars to be raised from the sale of my real estate in the city of Birmingham, Alabama."

The defendant demurred to the bill, assigning as grounds of demurrer, among others—1st, that the bequest in perpetuity was void; 2d, that the county commissioners were incapable of taking the bequest; 3d, that Chambers County was improperly joined as a complainant in the bill. The chancellor sustained the demurrer as to the misjoinder of the county as a party, and ordered the name to be stricken out; but overruled the demurrer on the other grounds assigned, held the bequest valid, and, on final hearing on pleadings and proof, rendered a decree for the complainants, and ordered the money to be paid over to them. The defendant appeals from this decree, and here assigns it as error.

GEO. P. HARRISON, Jr., and TROY, TOMPKINS & LONDON, for appellant.—The bequest is an attempt to create a perpetuity, and is void, unless it can be sustained as a charitable bequest. 1 Perry on Trusts, § 384, note 1; *Jones v. Habersham*, 107 U. S. 174; *Williams v. Pearson*, 38 Ala. 299. But it is not a charitable bequest, within the rule against perpetuities, though it may be sustained when no perpetuity is attempted. Adams' Equity, 66; 2 Bla. Com. 273-4; *Doe v. Pitcher*, 6 Taunton, 359; 3 M. & S. 407; 2 Wms. Ex'rs, 920; *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139; *Dawson v. Small*, L. R., 18 Eq. Cas. 114; *Jones v. Habersham*, 9 Moak's R. 685; *Mel-*



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*lick v. Asylum*, 1 Jac. 180; *Gilmer v. Gilmer*, 41 Ala. 1. The county commissioners are not a corporation, and can not take the bequest.—Perry on Trusts, §§ 46, 47; *Baptist Asso. v. Hart*, 4 Wheaton, 27; *Inglis v. Trustees*, 3 Peters, 99.

DOWDELL & DENSON, *contra*.—That the county commissioners are capable of taking the bequest, see *Carter v. Balfour*, 19 Ala. 814. That the bequest is charitable, see Perry on Trusts, vol. 2, § 706, and authorities there cited; also, *Williams v. Pearson*, 38 Ala. 299. The doctrine is well settled, in Alabama, that a court of equity will uphold bequests to charitable uses, where an ascertainable object is designated by the testator, although no trustee is appointed, or the appointed trustee is incapable of taking the legal interest. 19 Ala. 814; 38 Ala. 299.

SOMERVILLE, J.—Whether we regard this bill as one filed by the county of Chambers, or by complainants as members of the court of County Commissioners of that county, it is, in either aspect, entirely wanting in equity. Its purpose is to enforce a trust created by the last will and testament of Mrs. Mary F. McLemore. This trust arises under the eleventh item of the will, in which the testatrix gives and bequeaths “to the Commissioners of Roads and Revenues of the county of Chambers and State of Alabama, and their successors in office, or to such authority as may control and direct the finances of said county of Chambers,” the sum of one thousand dollars, “to be held in perpetuity in trust.” It is directed that the legal interest arising from this sum “be expended annually in the repair, preservation and safe-keeping” of the burial-grounds and monuments of the testatrix, and of certain deceased members of her family, which are located in the county of Chambers.

It is argued, that this clause of the will creates a perpetuity, and is a bequest not in its nature charitable, and that it is for this reason void. The point is one in reference to which the authorities are not agreed, and its consideration is unnecessary for the decision of this case. We, therefore, pretermit it. 2 Perry on Trusts (3d Ed.), § 706, and cases there cited.

We are quite clear in the view, that the complainants are legally incapable of accepting this trust, even though it be construed to be a charitable devise. If they do so at all, it must necessarily be in their official and corporate capacity; for in no other way can they claim to have perpetuity of existence, or succession, and they are not personally named in the will. The duties imposed by the trust are most obviously repugnant to, and inconsistent with the well defined purposes for which

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the public corporations, known in this State as counties, were created and organized. Counties are corporate political subdivisions of the State, designed as agencies in the administration of civil government, and more particularly intended to aid in promoting the paramount object of all government, which is to afford security to the preservation of the life, liberty, and property of the citizen. The court of County Commissioners, or, as they were designated prior to the Code of 1852, "the Commissioners of Revenue and Roads," are officers of the county, and their chief function is to control the property and finances of the county, and to exercise a general superintendence over the public roads in the county.—Code, 1876, §§ 756, 1619. The only duty of a purely charitable nature, which is devolved on them, is that of making rules and regulations for the support of the poor. This is a part of their police power, and is specially delegated by statute.—Code, 1876, § 746, subdiv. 5. Counties, therefore, can accept no trusts, even of a charitable nature, in which they have no interest, unless it has some connection with the maintenance or benefit of the poor, either in relieving their physical wants and suffering, or in promoting their moral, religious, or secular education, or otherwise extending to them the hand of charity. If the trust is foreign to these purposes, and in no wise germane to the objects for which such public corporations are known to be instituted, but is designed merely for the private benefit of a particular person, or class of persons, who are not indigent and in natural life, neither the county, nor the court of County Commissioners, has the power in law to hold or execute it. As to them, it is a matter entirely *ultra vires*.—Angell & Ames on Corp. (3d Ed.), §§ 43–44; 2 Dill. Munic. Corp., §§ 567, 573; *Clark v. Foot*, 8 Johns. 329; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127, 189; *Jones v. Habersham*, 107 U. S. 174.

The trust here imposed is the management of a fund purely for a private benefit—the lending of money at interest, collecting such interest from year to year, and appropriating it for the repair and preservation of private burial-grounds. It needs no argument to show that this is entirely beyond the scope of the duties imposed upon these commissioners as public officers. Neither the county in its corporate capacity, nor any succeeding body of commissioners, can be held responsible for any waste or mal-administration of this fund by the complainants. It is against the policy of the law to allow them to burden the county, or their successors in office, with such a duty. They are paid for their official services a *per-diem* allowance out of the county treasury. It is proper that their time and deliberations should, during the sessions of the court, be devoted to the business of the public, and not to that of

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private persons, however worthy its nature. If one such burden is assumed, so in like manner another may be. The result might finally be, that, in the course of a few generations, the chief time of these county officials would be monopolized in discharging duties which might more appropriately be devolved upon the sexton of a churchyard, or of a city cemetery.

The chancellor erred in granting the relief prayed in the bill. His decree is reversed, and a decree will be rendered in this court, dismissing the bill at the costs of the appellees, in this court and the court below.

## Johnson v. Holifield.

*Bill in Equity by Executor, asking Instructions.*

1. *Bequest in perpetuity, in trust for preservation of private burying-ground.*—A bequest of money to county commissioners, “and their successors in office, or to such authority as may control and direct the finances of said county, to be held in perpetuity in trust,” and the interest to be expended annually in the repair, preservation and neat keeping of the graves and monuments of the testatrix and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and is void.

APPEAL from the Chancery Court of Lee.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 27th March, 1886, by Joseph A. Holifield, as the executor of the last will and testament of Mrs. Mary F. McLemore, deceased, against Lucy A. Johnson, who was the residuary legatee under the will; and asked the instructions of the court as to the validity of a bequest contained in the will, and the proper disposition of moneys in his hands arising from the sale of real estate. The defendant demurred to the bill, on the ground that the bequest was void. The chancellor overruled the demurrer, and his decree is here assigned as error.

TROY, TOMPKINS & LONDON, for appellant.

GEO. P. HARRISON, Jr., *contra*.

CLOPTON, J.—The will of Mary F. McLemore contains the following clause: “I give and bequeath to the Commissioners of Roads and Revenues of the county of Chambers and State of



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Alabama, and their successors in office, or to such authority as may control and direct the finances of said county of Chambers and State, the sum of one thousand dollars, to be held in perpetuity in trust, and direct that the legal interest arising from said sum of one thousand dollars be expended annually in the repair, preservation, and neat keeping of the graves and monuments of myself, my first husband, William George, my second husband, Col. Charles McLemore, and my father and mother, all being and will be buried in said county of Chambers, Ala.; and I earnestly entreat this bequest and trust will be forever faithfully executed; said sum of one thousand dollars to be raised from the sale of my real estate in the city of Birmingham, Ala." The executor, having sold the real estate, and having in possession the requisite sum of money, applies to the court to construe this clause of the will as to the validity of the bequest; and if it held to be valid, for the appointment of a trustee, or directions to whom the money shall be paid.

The bequest, by its own terms, attempts to create a perpetuity; and is invalid, as repugnant to the rule against perpetuities, unless it can be brought within the exception—a charitable use.—1 Perry on Trusts, §§ 377–380. However strongly the courts may be moved to carry in effect the intention and objects of the testator in the construction and execution of wills, such purpose cannot be accomplished, when any principle of law will be thereby violated. The rule against perpetuities, so firmly established and universally sustained, with a single exception, is founded on considerations of public policy. It has been said: "A perpetuity is a thing odious in the law, and destructive to the commonwealth; it would stop commerce, and prevent the circulation of property." A private trust can not be created, so as to operate the inalienability of property beyond the period prescribed by the rule. But gifts to charitable uses, being highly favored by the courts, and the public being regarded as concerned in upholding such trusts, will be sustained and carried into effect, though their duration may be perpetual. Hence, the sole subject of inquiry is, whether the bequest creates a private trust, or is its object a charitable use, in the legal sense.

It may be conceded, that a testator may make a valid bequest of money to erect a tomb, or monument; and that a valid trust to preserve and keep in repair a vault or tomb, or burying-ground may arise, when imposed as a condition to a bequest of property to individuals or to a society, a perpetuity not being created. Within the latter class falls *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139, in which the Vice-Chancellor says: "Now I am satisfied that a condition for keeping a tomb in repair is not a charitable use, and is not illegal. It may be

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illegal to vest property in perpetuity in trust for that purpose, so as to create a perpetuity; but a direction that the wife and Mary Martha Lockley are during their lives to enjoy the annuity, and are to keep the tomb in repair, is quite lawful; it is a valid condition imposed on the enjoyment." And it may be that a bequest to maintain and keep in repair a public cemetery, though in perpetuity, would be sustained. The present case does not fall in either of these classes. The trust is, that the interest shall be expended annually, in the repair, preservation, and neat keeping of the graves and monuments of testatrix and four other named persons—a trust characterized by an English Vice-Chancellor as merely honorary.

Trusts for charitable uses did not originate in the English statute, nor are they limited to the objects therein enumerated. Whatever object comes within the spirit and intentment of the statute, is included. GRAY, J., gives a clear and comprehensive definition in *Jackson v. Phillips*, 14 Allen, 539. He says: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." In *Dexter v. Gardner*, 7 Allen, 243, a bequest, which gave personal property to the overseers of the "Long Plain Friends' preparatory meeting and their successors in office in trust forever, the income to be appropriated for the benefit of the Friends' meeting in Fairhaven and Rochester," was sustained, on the ground that all the objects, to which the overseers had a right, by the usages of their denomination, to apply their funds, are to be regarded as charitable. The objects were the maintenance of religious worship, aiding the sick and poor, and the purchase and repair of burying-grounds. But, in this case, the distinction is recognized. It is said: "The case of *Doe v. Pitcher*, 6 Taunt. 359, in which it was held that a grant in trust to repair, and, if need be, to rebuild a vault and tomb for a private family, was not a charity, is not in point, because the object there was merely secular." And in a late case in the same court, it is held, that a provision by will, for perpetually preserving, adorning, and repairing a private mortuary monument, is void.—*Bates v. Bates*, 134 Mass. 110; s. c., 45 Amer. Rep. 305. In *Swasey v. American Bible Society*, 57 Me. 523, a legacy to keep in repair a family

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burying-ground was upheld. But, in a recent case, it was also held, that a bequest of money, the income to be expended forever to keep the testator's lot in a certain burying-ground in good order and condition, is in perpetuity, and void.—*Piper v. Moulton*, 72 Me. 155.

In this State, the jurisdiction of courts of equity, in such cases, is independent of the statute of uses, or of any prerogative power of the court, and is founded on its original and inherent power to sustain such trusts, because of their charitable uses,—a jurisdiction which was exercised prior to the statute. Excepting the doctrine of *cy pres*, of the prerogative power, and of superstitious uses, as inconsistent with the character of our institutions, “the law of charities, as administered in the English Court of Chancery, is substantially our law.”

*Williams v. Pearson*, 38 Ala. 299. From the English law, as modified by our decisions, must be mainly derived the rules and principles governing the nature and validity of the bequest under consideration. It seems to be well settled by the course of decisions, that a bequest of money, the interest thereon to be perpetually applied to preserving and keeping in repair the graves and monuments of testatrix and other named persons, is repugnant to the rule against perpetuities, and void. *Richard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616; *Doe v. Pitcher*, 6 Taunt. 358; *Hoar v. Osborne*, 1 L. R. Eq. 583; *Dawson v. Small*, 18 L. R. Eq. 114; *Thompson v. Pitcher*, 2 Marsh. 61; 1 Jar. Wills, (Big. Ed.) 211; 2 Williams Ex'rs, 1140.

The bequest under consideration possesses none of the elements of a charitable use. It is not a gift to any public purpose. In the object, for which the interest on the money is to be expended, the public have no concern. There is not the requisite vagueness and indefiniteness as to the number of persons to be benefited. It is not to keep in repair a family burying-ground, in which rich and poor members may be buried. The object is to preserve the graves and monuments of testatrix and four relatives, specifically designated. The purpose is merely secular. However gratifying and creditable to the heart of the testatrix may be the object of the bequest, we are forced by the current and weight of authority, both in England and America, to declare that it is not a charitable use in the legal sense; and that the bequest attempts to create a perpetuity, and is void.

The record does not show whether the residuary legatee is also the heir at law. If not, the heir is not made a party. We therefore express no opinion, to whom the money bequeathed passes, the legacy being void.

The decree of the chancellor is reversed, and a decree will be



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here rendered declaring the bequest void. The appellee will pay the costs of suit in the Chancery Court, and the costs of appeal, the amount so paid to be retained by him out of the assets in his hands as executor.

## Knowles v. Steed.

### *Attachment for Rent by Landlord, against Tenant's Crop.*

1. *Affidavit as to removal of crop.*—An affidavit for an attachment at the suit of the landlord, on the ground that a part of the crop has been removed without his knowledge or consent (Code, § 3472, subd. 2), must allege that it was removed from the rented premises, or it is substantially defective.

2. *Attachment in justice's court; what defects are amendable.*—In an attachment case commenced in a justice's court, and removed by appeal into the Circuit Court, the attachment can not be quashed or dismissed "for any defect of form in the affidavit," &c. (Code, § 3693); but the statute does not apply to defects of substance.

3. *Same; objections before justice.*—In such appeal case, "no objection can be made in the appellate court to the regularity of the proceedings, which was not made before the justice of the peace" (Code, § 3693); but, formal pleadings not being required in a justice's court, it is enough if it appears that objection was in fact made.

APPEAL from the Circuit Court of Clay.

Tried before the Hon. LEROY F. BOX.

This action was brought by John W. Knowles, against Alex. M. Steed and his wife; and was commenced by attachment, sued out before a justice of the peace on the 29th November, 1880. The affidavit for the attachment stated, that plaintiff "rented to A. M. Steed and his wife, Susan E. Steed, his undivided half interest in the Steed & Knowles farm for the year 1880, for the sum of one hundred dollars; and that they, as such tenants, have removed a portion of the crops grown on said rented premises, without the knowledge or consent of affiant, their landlord; and that said amount is due and unpaid, in whole or in part," &c. The attachment was made returnable before the justice who issued it, and it was levied by the constable on the defendants' crop of cotton and corn. The defendants appeared, on the return day of the writ, and, as recited in the transcript returned by the justice to the Circuit Court, "moved to quash the affidavit and writ of attachment, on the ground that the affidavit fails to state that the crop, or a part thereof, was removed from the premises; second, that the affidavit states that the removal was without the knowledge

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or consent of plaintiff. The court overruled both motions. It was admitted that the same questions were raised [by] a proper plea in abatement, which the court dismissed, and allowed the affidavit to be amended, against the objection of the defendants. Motion was then made to dismiss the attachment, on the ground that it was issued several days before the amendment of the affidavit; which motion was overruled." On appeal to the Circuit Court by the defendants, they again filed a plea in abatement on account of the insufficiency of the affidavit; to which plea the court sustained a demurrer, on account of formal defects, but allowed the plea to be amended; and a demurrer being again interposed, which was overruled, judgment final was rendered for the defendants. The plaintiff appeals from this judgment, and assigns it as error, together with the judgment sustaining the demurrer, and the allowance of the amendment to the plea in abatement.

LACKEY & BIRCKHEAD, for appellant.

PARSONS, PEARCE & KELLY, *contra*.

STONE, C. J.—In *Fitzsimmons v. Howard*, 69 Ala. 590, speaking of affidavits as a leading process in attachments for rent, we enumerated certain jurisdictional averments, which, we said, the affidavit must contain; and, failing in either of them, we declared it was not amendable. We added: "An affidavit, wanting in any of these essentials, will be abated on plea." Among the essentials, we mentioned the enumerated statutory acts of malfeasance by the tenant, which will authorize attachment for rent; the one applicable to this case being, "that the tenant has removed from the premises . . . some part of the crop," &c. The affidavit in this case, on which the attachment was sued out, simply averred, "that, as such tenants, they had removed a portion of the crop grown on said rented premises, without the knowledge or consent of their landlord." The affidavit in this case fails to come up to statutory requirements; and the omission being jurisdictional, it was not amendable.—*Staggers v. Washington*, 56 Ala. 225; *Fleener v. Dickerson*, 65 Ala. 129.

It is contended for appellant, that the error noted above was waived by the appeal taken. This is claimed under section 3121 of the Code of 1876, which provides, that appeals from justices of the peace "must be tried according to equity and justice, without regard to any defect in the summons, or other process before the justice." This is certainly the rule as to ordinary defenses.—*Clough v. Johnson*, 9 Ala. 425; *Glaze v. Blake*, 56 Ala. 379; *Perry v. Hurt*, 54 Ala. 285; *Abrams v. John-*

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son, 65 Ala. 465. There is, however, another section of the Code which governs this case. Section 3693 of the Code of 1876 declares, that "no attachment can be quashed or dismissed in the Circuit Court, for any defect of form in the affidavit, attachment, or bond, or for want of a bond, if the plaintiff is willing and able to execute a sufficient bond; and no objection can be made in the appellate court to the regularity of the proceedings, which was not made before the justice of the peace." The present case does not come under the first clause of the section copied, for the defect in the affidavit is not one of form, but one of substance. Even this, however, to be available in the appellate court, must have been made before the justice of the peace.—*Staggers v. Washington*, 56 Ala. 225. Objection was made before the justice in this case, and we think sufficiently made. Except in special cases, of which this is not one, formal pleadings are not required in a justice's court.

We need not consider whether the Circuit Court erred in allowing an amendment of the plea in abatement. It was sufficient without amendment.

Affirmed.

## **Donovan v. South & North Ala. Railroad Co.**

*Action against Railroad Company, for Damages on account of Personal Injuries.*

1. *Error without injury.*—The rule established by the later decisions of this court is, that the presumption of injury from error is repelled when, on the whole record, the court can see clearly and satisfactorily that no injury resulted from the error.

2. *Same.*—On appeal by the plaintiff below, in an action against a railroad company for damages on account of personal injuries, the plaintiff having recovered a judgment on verdict, and the rule as to the measure of damages having been correctly stated to the jury, other charges given as to the legal liability of the defendant under the facts in evidence, if erroneous, are not ground of reversal.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. S. H. SPROTT.

RICE & WILEY, and JAMES WEATHERLY, for appellant.

HEWITT, WALKER & PORTER, *contra*.



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SOMERVILLE, J.—The action is one for damages, brought by the appellant, who was an infant about ten years of age, and based on certain bodily injuries alleged to have been produced by the negligence of the defendant's servants while operating a steam-engine, with a train of cars attached; the plaintiff being at the time upon the railroad track of the defendant corporation. The jury found a verdict in favor of the plaintiff in the court below, who is here the appellant, for the sum of thirteen hundred and fifty dollars; and from this judgment he takes this appeal.

The assignments of error are all based on charges given by the court, to which proper exceptions were taken. All of these charges refer to the naked question of the legal liability of the defendant to the plaintiff, for the alleged wrongful act which occasioned the plaintiff's injuries. None of them relate to the rules of law governing the proper measure of plaintiff's damages in the event of a recovery by him. The whole cause involved but three inquiries: (1) whether the agents of the defendant were guilty of any tort, wrongful act, or negligence, which resulted in producing the injury suffered by the plaintiff; (2) whether the plaintiff was guilty of such contributory negligence as barred his right to recover; (3) if entitled to recover, what should be the amount of plaintiff's damages?

The verdict of the jury shows, clearly and conclusively, that they found the two first issues against the defendant, and in favor of the appellant. Admitting, therefore, that there may have been error in one or more of the numerous charges of the court bearing on the issue of liability *vel non*, it is obvious that the jury could not have been misled by such error; because the record shows that they disregarded the supposed objectionable charges, and found, notwithstanding, that the defendant was liable. The only possible objection which can be urged by appellant to this finding is, that the amount of damages allowed was not sufficiently large. But one ruling of the court on the subject of the measure of damages is found in the record, and this is admitted to be correct, no exception having been taken to it. We will presume that the court gave every proper instruction to the jury on this point, that all of the instructions were free from error, and that the jury acted obediently to them, as was their sworn duty. The case presented, then, is merely one of error without injury, which satisfactorily and clearly appears upon an inspection of the whole record.

It is true, as argued, that the rule is to reverse when error is shown, because injury will be presumed, unless it affirmatively appears that no injury resulted from the error. It was

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said in an early case decided by this court, that in the event of an erroneous ruling by the lower court, the judgment would be reversed, unless it appears from the record that it was "impossible that injury could have accrued to the party against whom the error was committed."—*Pinkston v. Greene*, 9 Ala. 19, 23. In another case, the assertion was made, that a reversal must take place, unless it appeared "beyond a reasonable doubt that injury did not result from error."—*Hagerthy v. Bradford*, 9 Ala. 567, 571. The rule, however, as settled by the later cases, is, that the presumption of injury will be repelled, when the appellate court, upon surveying the whole record, can see clearly and satisfactorily that no injury resulted from the error.—*Clark v. Taylor*, 68 Ala. 453; 1 Brick. Dig. 780, § 100. To this conclusion we must be led, unless we assume that the jury were not sufficiently intelligent to comprehend the charges of the court, or else that, understanding, they perversely misapplied them.

It results from these views, that the judgment of the Circuit Court must be affirmed.

CLOPTON, J, not sitting.

## Swann & Billups v. Kidd.

### *Motion to re-tax Costs on Appeal.*

1. *Tax on appeal for benefit of Supreme Court library; constitutionality of.*—The statute imposing a tax-fee of six dollars in each case decided on appeal by this court, for the benefit of the library (Sess. Acts 1882-83, p. 149), is a legitimate exercise of the taxing power, and is not violative of any constitutional provision.

APPEAL from the Circuit Court of St. Clair.

Motion to re-tax costs on appeal in this court.

SAMUEL F. RICE, for the motion.

PER CURIAM.—The motion is made in this case to re-tax the costs, by striking out the sum of six dollars taxed for the benefit of the Supreme Court Library, under the act of February 23, 1883, and designated as the "Library Tax."

The purpose of this act, as shown by the title, is "to provide a fund for the support of the Supreme Court

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Library, without appropriations from the treasury; and for this purpose it is enacted, that, in all suits decided on appeal in the Supreme Court, there shall be taxed, as costs, the sum of six dollars, in each case, to be collected as other costs, and to be paid to the librarian of the court. This sum is designated as the "Library Tax," and is authorized to be expended by the Supreme Court "for maintaining the Supreme Court Library."—Acts 1882–83, p. 149.

It is urged in support of the motion that the law is unconstitutional.

The imposition of tax fees as a part of the costs, in law-suits and prosecutions, has been of immemorial duration in this and other States. The beneficiaries of these fees have been, variously, lawyers, solicitors, officers of the court, the several counties, the State itself, and even the presiding judge who may have decided the cause. That the General Assembly possesses the constitutional power to enact laws of this character, is axiomatic, unless there be some clause in the State or Federal constitution which, directly or indirectly, prohibits it.—*Mangan v. State*, 76 Ala. 60.

The taxing power is nowhere limited to property, in the strict sense of the term. It may extend as well to franchises, privileges, and, incidentally, to admitted constitutional rights. The subjects or objects of taxation are within the discretion of the legislative department, within constitutional limits: and so with their classification, so long as the principle on which it is made is not arbitrary, capricious, and oppressive in operation. *Moog v. Randolph*, 71 Ala. 597, 603.

We are unable to discover any clause in the constitution, to which this law is repugnant. It does not debar any litigant from prosecuting or defending any suit in the appellate court, within the meaning of section eleven (11) of the Declaration of Rights. It merely regulates the right by a small tax, in no wise onerous, or prohibitory in its nature. A constitutional right is often subject to regulation by reasonable incidental taxation, although it can not be impaired or destroyed under the device or guise of being regulated.—*Joseph v. Randolph*, 71 Ala. 499; s. c., 46 Amer. Rep. 347.

It is equally obvious, that this tax does not violate section 14 of the Declaration of Rights, providing that the courts shall be open, and "right and justice shall be administered, without sale, denial, or delay." It is certainly no sale of justice. This clause is known to have been taken in substance from *Magna Charta*; and history shows that its chief purpose was to assail the existing evil of anciently holding courts in clandestine sessions, and of paying fines to the king and his officers, for delaying or expediting law-suits, and for obtaining justice. It has



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no reference to the exercise by the sovereignty of the power of legitimate taxation. The precise point has been settled in other States.—*Harrison v. Willis*, 7 Heisk. 35; s. c., 19 Amer. Rep. 604; *State v. Board of County Com'rs*, 4 Neb. 537; s. c., 19 Amer. Rep. 641.

There is nothing in the suggestion, that the tax is for a private purpose. The maintenance of a library, to aid the judiciary department in the proper administration of the law, is a public benefit—one to which taxes in the treasury have long been appropriated. That the tax is paid directly for the purpose, without the delay and formality of passing through the coffers of the State, can not change its nature. The State itself is virtually the beneficiary of its own bounty.

The case of *S. N. Ala. R. R. Co. v. Morris*, 65 Ala. 193, has no application to this case. See *Smith v. Louisville R. R. Co.*, 75 Ala. 449.

The motion must be denied.

## Sanders v. Askew.

*Bill in Equity to set aside Sale under Mortgage, and for Account and Redemption.*

1. *Purchase by mortgagee at sale under mortgage; limitation of bill to set aside.*—When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, a bill to set aside the sale, and for a redemption and account, filed nine years and ten months after the sale, comes too late; and an alleged offer to account by the mortgagee, made two years after the sale, if it can have the effect to keep the mortgage account open, does not obviate the lapse of time.

2. *Same.*—If the sale was made without giving notice as required by the terms of the mortgage, it is void, and the legal relation between the parties remains unchanged; and a bill to redeem would not be barred until the lapse of ten years from the surrender of possession.

APPEAL from the Chancery Court of Marengo.

Heard before Hon. THOMAS COBBES.

The original bill in this case was filed on the 14th November, 1883, by Joseph H. Sanders, against Samuel H. and W. S. Askew, brothers engaged in the mercantile business as partners; and sought to set aside a sale of certain lands under a mortgage executed by the complainant to the defendants, at which they became the purchasers, and for an account and redemption. The mortgage was dated March 31st, 1871, and was signed by complainant and his wife. It purported to be

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given to secure the payment of complainant's promissory note for \$2,545.13, of even date with the mortgage, and payable to Askew Brothers on the 1st November, 1871; and conveyed the cotton raised by the complainant during the year 1870, mules, horses and cows, and a tract of land containing 160 acres, on which complainant and his family were then living, and which was a part of section nineteen (19), township sixteen (16), range five (5). The complainant alleged in his bill, that he had business dealings with the defendants' father for many years, and continued his dealings with the defendants, who succeeded their father in business, having great confidence in their integrity; that the mortgage and secured note were brought to him to be signed, by one of the defendants, while he was confined to his bed with serious illness; that he protested against any indebtedness on his part to the amount specified, and insisted that they had not given him credit for cotton received and sold; that the fact was admitted by said defendant, who urged him nevertheless to sign the paper for their accommodation, promising a settlement of their accounts so soon as complainant recovered; and that he signed the note and mortgage under these circumstances, and relying on these promises. It was alleged, also, that the complainant afterwards delivered to defendants twelve or fifteen bales of cotton, to be sold and applied in payment of any balance he might owe them; that the defendants never accounted to him for the proceeds of sale of this cotton, nor for other personal property covered by the mortgage, of which they took possession during a long illness which confined him to his bed for more than eighteen months; that on his recovery, in 1874, he learned that the defendants claimed to have foreclosed the mortgage by sale under the power on the first day of January, 1874, becoming themselves the purchaser at the sale, and had taken possession of the land conveyed by the mortgage, not disturbing him in the possession of the homestead, and also of another tract of land containing 240 acres. The bill alleged, also, that this sale was irregular and void; that no notice of the intended sale was given, as required by the terms of the mortgage; that no person was present at the sale, except the defendants, their clerks, and a few friends; that the price bid was grossly inadequate; that no account of the sale had ever been rendered, and no credit given for the money bid. It was alleged, also, that the defendants, in response to repeated demands for a settlement, made frequent promises, which they broke from time to time; that in April, 1874, defendants instituted suit on the note secured by the mortgage, but, after repeated continuances, the suit was dismissed; and that in October, 1883, in reply to a final

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demand for a settlement, defendants proposed to submit the matters of account to arbitration.

The chancellor sustained a demurrer to the bill, on the ground that the claim was barred by lapse of time; and his decree is now assigned as error.

W. M. BROOKS, for appellant.

WATTS & SON, *contra*.

STONE, C. J.—The mortgage in this case was executed in 1871. Taking the averments of the amended bill most strongly against the pleader, they must be interpreted as an admission by Sanders that Askew Brothers sold the land under the mortgage, January 1st, 1874, and became purchasers at their own sale. They immediately took possession, and have held possession ever since. It is averred in the bill that, on two or three occasions, after January, 1874, one of the Askew brothers admitted that the account growing out of the mortgage was unsettled, and expressed a willingness to have the account overhauled, and a proper settlement made. The latest time this agreement is alleged to have been expressed was in the spring of 1876. The original bill in this case was filed in November, 1883—nine years and ten months after the sale under the mortgage, and seven and a half years after the last agreement to come to a settlement is alleged to have been made by Askew. Now, if we concede to this alleged agreement the effect of keeping the mortgage account open, up to the last time it was expressed—April, 1876—the present suit, as a bill to redeem, comes too late, if there is no other infirmity in the sale than the fact that the mortgagees purchased at their own sale. *Robinson v. Cullom*, 41 Ala. 693; *Childress v. Monette*, 54 Ala. 317; *Harris v. Miller*, 71 Ala. 26; *Cooper v. Hornsby*, *Ib.* 65; *Comer v. Sheehan*, 74 Ala. 452. So, if the mortgage sale under the power was in all things regular, save the one pointed out, it must be declared that it has become valid and binding by lapse of time.

The bill avers, however, that there was no notice given of the time and place of sale, in either of the modes required by the mortgage. If this be true, the sale was void, and did not change the relation of the parties as mortgagor and mortgagee.

*Wood v. Lake*, 62 Ala. 489. Ten years is the limitation within which a mortgagor out of possession may be let in to redeem; and according to the averments of the bill, Sanders had not been ten years out of possession when the bill was filed. The demurrer to the amended bill ought to have been overruled.



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If, as the bill avers, Askew Brothers sold and took possession of land not embraced in their mortgage, they were trespassers, and could have been evicted in a court of law. Chancery can give no relief on this ground.

Reversed and remanded.

## **Louisville & Nashville Railroad Co. v. Johnston.**

*Action for Damages against Railroad Company, by Passenger.*

1. *Variance*.—Under a complaint, in an action against a railroad company, which claims damages on account of the conductor's refusal to stop his train and put plaintiff off at the proper station, alleging that he "willfully refused" to stop, and carried her several hundred yards beyond, "without her consent, and against her protest;" if the evidence shows that the conductor only neglected to stop, and that the plaintiff not only submitted, but consented to alight at the further place, without objection or protest, there is a fatal variance between the averments and the proof.

2. *Implied contract that passengers may alight at platform not owned by railroad company*.—If the trains of the defendant railroad company were accustomed to stop at the platform at which the plaintiff desired to alight, although it was neither constructed nor owned by the company, an implied contract that passengers might stop there may be raised.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

HEWITT, WALKER & PORTER, for appellant.

SMITH & LOWE, *contra*.

SOMERVILLE, J.—The action is brought by the plaintiff, Mrs. Johnston, with whom her husband is joined as co-plaintiff, claiming damages of the defendant railroad corporation, for the refusal of the conductor to stop the train and put her off at a station to which she had paid her fare as a regular passenger on the road. The *gravamen* of the action, as averred in the complaint, is, that the defendant "willfully refused to stop" the train of cars at *Alice Station*, the point of plaintiff's destination, and carried her several hundred yards beyond the customary stopping place, where she was compelled to alight, without her consent, and against her protest.

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It is our opinion, that under this averment of the complaint, there could be no recovery in the action, unless the evidence in the cause satisfied the jury that the failure of the defendant's servant to stop the train was willful. If it was merely negligent, without more, there would be a fatal variance between the allegations and the proof. So, it would constitute a variance, if the evidence showed that the plaintiff not merely submitted, but consented to get off the train at this place, without objection or protest, the complaint alleging the contrary to be true.

There are several charges requested by the defendant, and refused by the court, presenting this phase of this case, which should have been given. For this error, the judgment of the court must be reversed, and the cause remanded.

If the trains of the defendant's road were accustomed to stop at the platform, described in the evidence as being at *Alice*, and to receive and deliver passengers there, then persons becoming passengers would have a right to presume that the railroad company's contract of carriage was to deliver them at that point, although this platform may not have been owned or constructed by the company. The customary use, and not the ownership of it, would be the controlling fact, from which an implied contract to that effect might be raised.

The circumstances under which exemplary damages may be recovered in this State, are so fully discussed by our recent decisions as to require no criticism of the rulings of the court touching this particular branch of the case.—*Wilkinson v. Searcy*, 76 Ala. 176; *Lienkauf v. Morris*, 66 Ala. 406; *S. & N. Ala. R. R. Co. v. McLendon*, 63 Ala. 266; *Louisville &c. R. R. Co. v. Guinan*, 47 Amer. Rep. 279.

As the probable amendment of the complaint may change the *status* of the case on another trial in the court below, we need not notice the other points raised by the record.

Reversed and remanded.

## Bibb v. Bibb.

### *Statutory Action in nature of Ejectment.*

1. *Devise to oldest son and his male issue, and, on default of such issue, then to second son and his male issue.*—Under the statute which was of force in 1840, converting an estate in fee tail into an estate in fee simple in the first taker (Clay's Digest, 157, § 37), if lands were devised to the testator's oldest son and his lawful male issue, and in case he should die leaving no lawful male issue, or the same shall become extinct be-

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fore he or they arrive at the age of twenty-one years, and likewise leaving no male issue, then to the next younger son and his lawful male issue, the oldest son took an absolute estate in fee simple. (Overruling *Edwards v. Bibb*, 43 Ala. 666, and 54 Ala. 475.)

2. *Same; conclusiveness of former decisions.*—This will having been before this court in the two cases above cited, which involved the same lands now in controversy, and in which the devise to the second son was sustained; the defendants in this case having bought on the faith of those decisions, and paid full value for the property; the court adheres to those decisions, as settling a rule of property for this particular case, although the plaintiff, daughter and sole surviving child of the oldest son, is not concluded by them as *res judicata*, and is not barred by the statute of limitations.

APPEAL from the Circuit Court of Limestone.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by Sallie Bibb, against Porter Bibb and others, to recover certain lands, particularly described in the complaint; and was commenced on the 23d February, 1885. Each of the defendants pleaded not guilty, as to the particular part of the lands which he claimed, and entered a disclaimer as to the residue; and the cause was tried on issue joined on this plea. The facts were agreed on, the following being all that are material: The lands sued for are a part of the plantation known as the "*Belmina estate*," of which Thomas Bibb, senior, died seized and possessed in the year 1840. By the will of said Thomas Bibb, senior, which was dated February 14th, 1839, and duly proved and admitted to probate soon after his death, the said plantation, with certain reservations, was devised to his widow for life; and the 6th item made this further disposition of it: "Having, in item 2 of this my last will and testament, given and bequeathed unto my wife, during her natural life, that portion of my Belmina estate not in this will expressly reserved; now, at the death of my said wife, I do hereby give and bequeath that same estate, together with all the things described in said item 2, as devised to my said wife, unto my eldest son, Thomas Bibb, and his lawful male issue; and in case my said son Thomas should die, leaving no lawful male issue, or, having such male issue, the same shall become extinct before he or they shall arrive at the age of twenty-one years, and likewise leaving no male issue, then, and in that case, my will and desire is, that [said] estate, with the property named and devised to my said wife, shall become the property of my son David Porter Bibb, to descend to the lawful male issue of him, my said son Porter. And, lest my other children may conceive that I have herein made a distinction, in thus excepting and devising this portion of my estate, I will remark to them, that I am prompted from no other consideration than to perpetuate this part of my estate in my family."



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At the death of the said testator, his son Thomas was about thirty-three years old, and had never been married; but he married in the year 1857, and had one child born to him, who is the plaintiff in this suit, and who was born in September, 1861; and he died on the 11th November, 1861. The testator's second son, David Porter Bibb, was married in the year 1834, and had two children living at the time of the testator's death, the eldest of whom, a son, was born in 1837, and is still living; and said David Porter Bibb died on the 9th June, 1865. After the death of the testator, by written contract and agreement between the widow and children, his son Thomas "became absolute owner of a part of said Belmina estate, and David Porter became, in like manner, the absolute owner of one fourth of said estate; but neither of these parts is in controversy in this suit." Said Thomas Bibb, junior, was, at the time of his death, in November, 1861, in possession of the land now sued for; and his widow, the plaintiff's mother, "remained in possession thereof, from that time until June, 1865, a short time before the death of said David Porter Bibb." After the death of said Thomas Bibb, junior, his widow intermarried with Julian Edwards; and he afterward instituted an action at law, jointly with his wife, as executrix of the will of Thomas Bibb, junior, against two of the sons of David Porter Bibb, to recover a part of the lands embraced in the tract, as shown by the report of the case in this court.—*Edwards v. Bibb*, 43 Ala. 666. Afterwards, Mrs. Edwards filed a bill in equity, jointly with her husband, claiming dower in the lands as the widow of said Thomas Bibb, junior; but the case was decided against her, on the authority of the former decision, as shown by the report of the case.—*Edwards v. Bibb*, 54 Ala. 475. In each of these cases, the devise to David Porter Bibb, on the death of Thomas Bibb without male issue, was sustained as a valid executory devise. "David Porter Bibb was, at the time of his death, on the 9th June, 1865, in possession of the lands now sued for; and his administratrix and heirs succeeded to his possession, and have been, with the defendants holding under them, in possession ever since. Porter Bibb, one of the defendants, is one of the heirs at law of said David Porter Bibb; and he and the other defendants are purchasers, claiming their respective portions from the widow and other heirs of said David Porter Bibb. The lands sued for are the same that were involved in the former cases, above cited, and held under the same will. The defendants bought their respective portions since the decision in 43 Ala. 666, and in reliance upon it, and paid full value; and much of this land has been bought and paid for since the decision in 54 Ala. 475. Both of these adjudications were known and acted on, in consummating said purchases."

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On these facts, the court charged the jury, on request, that they must find for the defendants. The plaintiff excepted to this charge, and she now assigns it as error.

F. P. WARD, and R. W. WALKER, for the appellant.—(1.) By the statute which was of force when this will was executed and took effect, Thomas Bibb took an absolute estate in the property, and the limitation over to David Porter Bibb was void. That statute was enacted in 1812, and was judicially construed in *Simmons v. Augustin* (3 Porter, 69); and being re-enacted in 1841 (Clay's Digest, 157, § 37), that construction was followed in *Martin v. McRee*, 30 Ala. 116. In *Edwards v. Bibb* (43 Ala. 666; 54 Ala. 475), that construction was departed from, and the limitation over to David Porter Bibb was sustained; but, in the second case, an able dissenting opinion was delivered by STONE, J., which is invoked by the appellant as her argument; and in support of its correctness the following authorities are cited: 3 Jarman on Wills, pp. 200–239; 1 Fearn on Remainders, 196; *Powell v. Board of Missions*, 49 Penn. St. 48–55; *Angle v. Brosius*, 43 Penn. St. 187; *Jones v. Standifer*, 18 Ala. 400; *Machen v. Machen*, 15 Ala. 375; *Lenoir v. Raney*, 15 Ala. 667; *Doe v. Applin*, 4 D. & E. 82; *Doe v. Cooper*, 1 East, 229; *Carter v. Tally*, 1 Call, Va. 154; *Hill v. Barrow*, 3 Call, 342; 1 Leigh, 96; *Tinsley v. Jones*, 13 Gratt. 289; 2 Comst. 355; *Gray v. Gray*, 20 Geo. 804; *King v. King*, 12 Ohio, 390; *Jordan v. Roach*, 32 Miss. 481; *Hanford v. Milligan*, 50 Ind. 542; *Purifoy v. Rogers*, 2 Saund. 388; *Doe v. Morgan*, 3 T. R. 763; *Allen v. White*, 16 Ala. 186; *Flinn v. Davis*, 18 Ala. 132; 2 Washb. Real Property, \*373; Tied. R. Prop. §§ 536–38. (2.) The appellant is not concluded by those decisions, to which she was neither party nor privy; nor is she barred by the statute of limitations.—Code, § 3236. (3.) The doctrine of *stare decisis* can not be invoked to defeat the appellant's rights. If the former decisions are correct, they do not need the aid of that doctrine; and if wrong, they ought not to be allowed to defeat the ends of justice. By express statutory provision, a former decision of this court is not conclusive on a second appeal (Code, § 3951); and yet the effort is made to hold it conclusive on a stranger, who had no opportunity to assert her rights. It is admitted that the defendants purchased in reliance on those decisions; but that reliance was on the correctness of the decisions, and it was coupled with knowledge of the statutory right reserved to the plaintiff to assail them in a new action. These two decisions involve only the construction of a single will, and a statute long since repealed; they have not become a rule property, and, if erroneous, ought to be overruled.

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Wells on *Res Adjudicata*, § 589; *Henry v. Bank*, 5 Hill, 535; 1 Kent's Com. 475; 48 Cal. 493; *Hays v. Cockrell*, 41 Ala. 91; *Hardigree v. Mitchum*, 51 Ala. 151; *Baker v. Pool*, 56 Ala. 14; *Nelson v. Boynton*, 54 Ala. 368; *Bean v. Chapman*, 73 Ala. 140. (4.) To hold that the former decisions, if erroneous, are nevertheless conclusive on the plaintiff, who has never had a day in court, would be to deprive her of her property without due process of law, and to "confess that the court is powerless to do justice to suitors who have never before had a hearing."—*McArthur v. Scott*, 113 U. S. 340, 405; *Neal v. Delaware*, 103 U. S. 397; *Mead v. Larkin*, 66 Ala. 87; *Wilburn v. McCalley*, 63 Ala. 436; *Ray v. Norsworthy*, 23 Wall. 128; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Pennoyer v. Neff*, 95 U. S. 714; Cooley's Const. Lim., 553-56.

McClellan & McClellan, and O. R. HUNDLEY, *contra*, relied on the former decisions in the case of *Edwards v. Bibb* (43 Ala. 666, and 54 Ala. 475), and the cases there cited on brief of appellees' counsel, as establishing the proper construction of the will: and further cited, as showing that those decisions should be adhered to, even if erroneous, as the law of this case, the following authorities: *Ala. Insurance Co. v. Boykin*, 38 Ala. 511; *Kelly v. Turner*, 74 Ala. 518; *Dewey v. Gray*, 2 Cal. 377; *Thompson v. Albert*, 15 Md. 285; *Hihn v. Courtis*, 31 Cal. 402.

CLOPTON, J.—The suit is a statutory real action brought by appellant, who claims title, by descent, as the heir at law of Thomas Bibb, Jr., whose title is derived from the will of his father, Thomas Bibb, Sr. The will was admitted to probate in April, 1840, and contained a clause, by which certain real estate, including the lands in controversy, and personal property, were devised to the widow of the testator during her life, and at her death to his eldest son, Thomas Bibb, and his lawful male issue; "and in case he should die, leaving no lawful male issue, or the same shall become extinct, before he or they shall arrive at the age of twenty-one years, and likewise leaving no male issue, then and in that case," to his son, David Porter Bibb, to descend to his lawful male issue. The declared purpose of the testator was to perpetuate this portion of his estate in his family. Thomas Bibb, Jr., died without leaving male issue; and after his death, David Porter Bibb took possession of the lands, under whom defendants claim. The statute then in force, and by which the will is governed, declared that every estate in lands, which is created an estate in fee-tail, shall be an estate in fee-simple, discharged of the



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conditions annexed thereto by the common law, restraining alienations before the donee shall have issue, so that the donee, in whom the conditional fee is vested, shall have the same power over the estate, as if they were pure and absolute fees; with a proviso, that any person may make a conveyance or demise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-man, and in default thereof to the right heirs of the donor in fee-simple.—Clay's Digest, 157, § 37.

This clause of the will, and the construction of the statute as applicable to its limitations, have heretofore undergone consideration, and have been adjudicated by this court in two cases.—*Edwards v. Bibb*, 43 Ala. 666; *Edwards v. Bibb*, 54 Ala. 475. The first case was an action brought by Edwards, who had married the widow of Thomas Bibb, Jr., in right of his wife, and in her name as executrix of the will of her former husband, against the sons of David Porter Bibb, who had also died, to recover a part of the lands devised. It was ruled, that the clause of the will constituted a valid executory devise of the lands over to David Porter Bibb, and that they passed to him on the death of Thomas Bibb, Jr., leaving no lawful male issue. The second case was an application by the widow of Thomas Bibb, Jr., for dower in the same lands; and the same ruling was adopted, though the justice rendering the opinion was constrained to say, that the number, if not the weight of the adjudged cases, would lead to the conclusion, that Thomas Bibb, Jr., took a fee simple in the lands under the operation of the statute. It is now urged, that the decision in the former cases is clearly erroneous; that the rights of the plaintiff were not then represented, and she should be accorded a day in court before being deprived of her property; and that the private hardships of the isolated case of defendants should not prevent the court from considering and determining her title upon its merits, independent and irrespective of the previous decisions.

*Edwards v. Bibb*, 43 Ala. 666, *supra*, is itself a departure from the rule declared, as far back as 1836, in the case of *Simmons v. Augustin*, 3 Por. 69, which was a decision made while the statute was in force; and which was subsequently followed in *Martin v. McKee*, 30 Ala. 116. After consideration, we do not hesitate to announce, that, in our opinion, the construction placed on the statute by the earlier decisions is correct, and that the principle of *Edwards v. Edwards*, *supra*, is in violation of the statute, and defeats the legislative intent. Without attempting to add anything thereto, we refer, in support of this conclusion, to the opinion of STONE, J., in 54 Ala. 475. As the statute has not been in force for more than thirty years,

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it is more probable that the decision first made has become a rule of property, than the later decisions. Had there been no express adjudications in respect to the title, under which the plaintiff claims, and to the lands in controversy, we should regard a return to the rule as settled while the statute was in force, and which stood unshaken for over thirty years, as a due observance of the rule of *stare decisis*, and as having less tendency to unsettle titles.

But the question here is, whether the court ought, under the circumstances, to specially apply the rule to express adjudications in respect to the same title and property involved in the present controversy. Nearly seventeen years have expired since the first, and nearly ten years since the last decision was made. The record affirmatively informs us, that the defendants purchased, and paid full value for the property, on the faith of these decisions. In the last case, it was said emphatically, that under the decision in the previous case, "the estate of Thomas Bibb, Jr., has forever lost the lands in controversy, under the ruling in that case, that the title in him became extinct at his death, because the limitation was effective." The public generally had a right to rely on such declared adjudications as conclusive of the title. If it should now be held that the plaintiff is entitled to recover, because the same limitation over is inoperative to divest the title of Thomas Bibb, Jr., it may now be said with more certainty and emphasis, than when said: "This would present a result at least somewhat startling. The repose of society, and the stability of titles, plead earnestly for an adherence to a decision of this, the court of last resort, when it has, after most exhaustive argument, solemnly construed a muniment of title."

The rule of *stare decisis* is founded on principles of conservatism; not intended to prevent progress in the science of the law, and such modifications and adaptations of judicial decisions as may be required by the varying and advancing conditions of society and industries; but most beneficial, when applied in the exercise of a sound and wise discretion. The rule does not rest on a disaffirmance of judicial fallibility. Its invocation implies, that former decisions may be erroneous, adherence to which, though erroneous, will be productive of much less evil than a departure therefrom. Neither does the rule disregard the importance and necessity of correct determinations of the law; nor require its perpetuated subversion, unless acquiescence in such supervision is requisite to the maintenance of social order, public peace, and confidence. Though a decision may involve private or public rights, when it can not be truly said to have been acquiesced in, or to have become a rule of property, it is both the right and the duty of the court

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to re-examine the questions, when again properly presented. *Pratt v. Brown*, 3 Wis. 609. But, when even a single decision, and especially repeated decisions, have stood for such length of time, that the rule thereby established may have become a rule entering into, and acted upon in the execution of contracts and the transactions of business, or may have constituted a rule of property, or a muniment of title, it is the imperative duty of the court to suffer it to remain undisturbed. The quieting of litigation; the public peace and repose; respect for the judicial administration of the law, and confidence in its reasonable certainty, stability, and consistency, and all considerations of public policy call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired on the faith of decisions of the court of last resort. The decisions referred to construed a muniment of title to particular property. Rights have been acquired on the faith of them. To overturn them now, in a controversy involving the same muniment of title, and the same property, would tend to impair confidence in, and bring reproach upon the administration of justice; and would verify the observation of a learned author, that in such case, "even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security." Though the plaintiff had no opportunity of being heard, and the decisions are not *res adjudicata*, they have become a rule of property with reference to the particular lands; and every consideration of right, justice and policy, exacts in this case a special application of the rule of *stare decisis*. There must be a period in the course of controverted and litigated titles to property, when the question shall be considered finally settled. That period has arrived in reference to this particular property. While, therefore, in the state of the four previous decisions as to the construction and operation of the statute, we should not regard re-examination as closed in respect to a distinct muniment of title, and to different property; when there have been two adjudications in reference to the particular muniment of title, and the particular property, upon which parties have acted, and money has been expended in good faith, we must regard the title sealed to further inquiry. The integrity and conservatism of judicial administration forbid the re-examination of a question, which will retroact to the subversion of title, acquired under such circumstances.—*Hihn v. Courtis*, 37 Cal. 398; *Hardigree v. Mitchum*, 51 Ala. 151; *Ala. L. Ins. & Trust Co. v. Boykin*, 38 Ala. 510; *Hibler v. McCartney*, 31 Ala. 501.

Affirmed.

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## Flowers v. Barker.

### *Bill in Equity for Foreclosure of Mortgage.*

1. *Wife as party to bill against husband.*—When a married woman joins with her husband in a mortgage of lands, the legal title to which stands in his name, she is not a necessary party to a bill for foreclosure, even if she claims an equity in the lands on the ground that her funds were used in paying the purchase-money ; and not being made a party, her rights would not be affected by the decree ; yet she may be made a party, in order that she may be bound by the decree.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 26th February, 1885, by George W. Barker against B. L. Flowers; and sought the foreclosure of a mortgage on a tract of land. The mortgage, a copy of which was made an exhibit to the bill, was dated the 28th December, 1883, and purported to secure the payment of a promissory note for \$1,319.05, which was of even date with the mortgage, and payable on the 1st January, 1885. The note and mortgage, each, was signed by said Flowers and his wife jointly; and appended to the mortgage was a certificate, in due form, as to the acknowledgment by both of them, and the examination of the wife separate and apart from her husband. The defendant demurred to the bill, because his wife was not joined as a defendant with him; and in his answer he alleged that the purchase-money for the lands was paid with funds belonging to her statutory estate, and that the complainant knew this fact when he took the mortgage. He also pleaded usury in the mortgage debt. The chancellor sustained the defense of usury, on final hearing on pleadings and proof, and rendered a decree of foreclosure as to the balance due on the mortgage debt, which he ascertained to be \$967; but the record shows no ruling on the demurrer. The final decree is now assigned as error, and an additional assignment is based on the overruling of the demurrer to the bill.

GARDNER & WILEY, for appellant.

N. W. GRIFFIN, *contra*.

STONE, C. J.—At and before the execution of the mortgage which the present bill seeks to foreclose, the legal title of

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the premises was in B. L. Flowers, the mortgagor. The legal title was therefore brought before the court. If Mrs. Flowers has any claim to, or interest in the land, it accrued before the mortgage was executed; and, from anything apparent in this record, it could, under the extremest possible view, rise to no higher dignity than an equitable right to trace her money into the land.—*Preston v. McMillan*, 58 Ala. 84. It was not improper to make her a party; for had she been, the decree would have established or barred her rights or claim. Not being a party, the decree does not affect her.—*Andrews v. Jones*, 10 Ala. 400; *Branch Bank v. Hodges*, 12 Ala. 118; *Hunt v. Acre*, 28 Ala. 580; *Walker v. Elledge*, 65 Ala. 51. She was not, however, a necessary party.—2 Jones Mort. § 1439, and notes.

Affirmed.

## Steed v. Knowles.

### *Action for Malicious Prosecution.*

1. *Mortgage of wife's property*.—As to property belonging to the equitable estate of a married woman, she is regarded as a *femme sole*, and may mortgage it for her own debt, or for the debt of her husband; but a mortgage of property belonging to her statutory estate, executed by her and her husband jointly, to secure her own debt or her husband's, is absolutely void, and creates no lien on the property,

2. *Presumption as to character of wife's estate*.—In this State, property belonging to a married woman is presumed, in the absence of averment and proof to the contrary, to constitute a part of her statutory estate; and no presumption that it is an equitable estate will be indulged against the husband, when he is the plaintiff in the action, although his right of action depends on the estate being statutory.

3. *Mortgage of mill property and machinery; destruction by fire, and lien on remaining machinery*.—Under a mortgage of a half interest in certain mill property and machinery, which is afterwards destroyed by fire, though the remaining machinery is thereby dis severed from the freehold, and converted into personal chattels, the lien of the mortgage on it is not discharged or impaired.

4. *Malicious prosecution; when action lies*.—To sustain an action for a malicious prosecution, the prosecution must have been instituted, not only maliciously, but without probable cause; though the party was acquitted, it does not necessarily follow that the prosecution was malicious, nor that it was instituted without probable cause; and while malice may be inferred from the want of probable cause, the want of probable cause can not be implied from malice the most express.

5. *Same; probable cause*.—Probable cause, as used in this connection, involves not only an honest belief on the part of the prosecutor, but a belief based on reasonable grounds, and not upon the caprice, prejudice, or idle dreams of the prosecutor.

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6. *Same ; advice of counsel.*—That the prosecution was instituted by the advice of counsel, given on a full and fair statement by the prosecutor of all the facts known to him, or which by proper diligence he could have ascertained, is a full defense to the action, though the advice was erroneous, or was not warranted by the facts stated ; but, if the prosecutor failed to disclose any material fact known to him, he can not shelter himself behind the advice of counsel founded on a partial statement.

7. *Sale or removal of mortgaged property, without consent of mortgagee ; subsequent satisfaction of mortgage debt.*—A subsequent payment or satisfaction of the mortgage debt, after an illegal sale or removal of the mortgaged property by the mortgagor (Code, § 4354), does not purge the illegal act of its criminality, and is no defense to a criminal prosecution.

8. *Construction and effect of record ; charge submitting legal question to jury.*—It is the province and duty of the court to construe the record showing the prosecution and its termination, and its legal effect should not be submitted to the determination of the jury.

### APPEAL from the Circuit Court of Clay.

Tried before the Hon. LEROY F. BOX.

This action was brought by Alex. M. Steed against John S. Knowles, to recover damages for a malicious prosecution ; and was commenced on the 16th January, 1882. The defendant pleaded not guilty, and the cause was tried on issue joined on that plea. At the instance of the defendant, the court gave nineteen charges to the jury, to each of which the plaintiff excepted ; and these charges are here assigned as error. The opinion states the material facts.

PARSONS, PEARCE & KELLY, for the appellant.

LACKEY & BIRCKHEAD, *contra*.

SOMERVILLE, J.—The prosecution which is here alleged to have been maliciously and wrongfully instituted against the plaintiff, and is made the basis of this action for damages, was a prosecution for selling personal property, at the time under written mortgage, in violation of the provisions of section 4354 of the present Code. The mortgage was executed by the plaintiff (Speed) and his wife, to the defendant (Knowles), in the month of May, 1878, conveying a half interest in certain mills and machinery, situated on land belonging jointly to the plaintiff's wife and one Gaston. In November of the same year, the mills and machinery were destroyed by fire, leaving only some unconsumed fragments of the machinery. Among those fragments was an iron shaft, which, the evidence tends to show, was sold by Steed to one Riddle, without the mortgagee's consent.

The record discloses the fact, that the mortgaged property belonged to Mrs. Steed, the plaintiff's wife ; but it does not



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appear whether it was her *equitable*, or her *statutory* separate estate. It is important that we should view the case in these two aspects, to prevent confusion.

If the property was the wife's equitable separate estate, she and her husband, or she alone, had the power to mortgage it, just as she could do if she were unmarried. This a settled and familiar principle of law. In this aspect of the case, there could be no doubt as to the validity of the mortgage, inasmuch as the evidence shows it to have been executed with all requisite formality, and acknowledged before the proper officer, who has appended his certificate in due form.

The next point of inquiry would be, whether the iron shaft, shown to have been a portion of the machinery, affixed to the mortgaged property, became personal property when it was detached by the accident of the fire; and, if so, whether it was still subject to the lien of the mortgage. On this question we entertain no doubt. A mortgage of land in this State is considered as a conveyance of the fee, at least in a court of law. Fixtures, annexed to the freehold at the time of the execution of the mortgage, pass to the mortgagee, and are subject to the lien of such incumbrance. And machinery, constituting the motive power of a mill, with the engine, boilers, shafting, and other means of communicating such power, are, as a general rule, regarded as fixtures, so far as to be covered by the conveyance, especially when such property belongs to the owner of the fee.—1 Jones Mort., § 440; *Patton v. Moore*, 37 Amer. Rep. 789. Nor would the lien of the mortgage be discharged, by the severance of such fixtures from the freehold by the accident of fire; because such removal would be without the consent of the mortgagor, and he himself without fault in wantonly producing it.—*Wilmarth v. Bancroft*, 10 Allen, 348; 1 Jones Mort. §§ 453 *et seq.* The severance would operate to convert the property thus severed into personalty, for the wrongful detention or conversion of which, it has often been held, a personal action would lie in favor of the mortgagee. Ewell on Fixtures, pp. 46–47, 414–415; *Hutchins v. King*, 1 Wall. (U. S.) 53.

In view of the foregoing principles, and upon the assumption that Mrs. Steed owned an equitable separate estate in the mortgaged property, the case is without any difficulty. The iron shaft, which was sold by the plaintiff, became personal property by the accidental severance of it from fire. It remained, however, subject to the lien of the mortgage; and the mortgagor had no lawful right to sell it, without the consent of the mortgagee, until he had satisfied the mortgage. If he did so, he would be guilty of a misdemeanor, within the meaning of section 4354 of the Code, and would be justly liable to the

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prosecution instituted against him by the defendant. If the plaintiff was guilty, then there was, of course, probable cause existing for his prosecution; and although the prosecution was not successful, but was defeated in the County Court, where instituted, the present action, without any doubt, will not lie.

But, as we have said, the evidence does not affirmatively show what was the character of Mrs. Steed's separate estate in the mortgaged property—whether equitable or statutory. The Circuit Court charged the jury, in effect, that, in the absence of proof, it would be presumed to be equitable, and that it was incumbent on the plaintiff to show the contrary, if true. This was error. In *Patterson v. Kicker*, 72 Ala. 406, we ruled, that personal property, owned by the wife as separate property, would be presumed to be a part of her *statutory* estate, until the contrary was proved. If it be her equitable separate estate, this must be shown affirmatively. The giving this charge will operate to reverse the judgment.

We announce the following principles as a sufficient guidance upon another trial.

If the estate in question is not shown to be equitable, it will be presumed to be *statutory*. In the latter contingency, the mortgage executed by the plaintiff and his wife will be void, having been executed to secure a debt of the husband's created for borrowed money. This, we have uniformly held, in an unbroken line of decisions, extending back to *Bibb v. Pope*, 43 Ala. 190. If the mortgage was void, it created no lien on the article of personal property—the iron shaft—shown to have been sold by the plaintiff; and the act of sale by him was not a misdemeanor, or other violation of law, for which a criminal prosecution would successfully lie. The question to be determined, however, in this case, will not necessarily be whether the plaintiff was actually guilty of the offense for which he was prosecuted. If the defendant, Knowles, had *probable cause* to believe that he was guilty, the prosecution was justifiable, notwithstanding the innocence of the plaintiff, or the fact of his acquittal.

The present action, which is for malicious prosecution, will not lie, as the court correctly instructed the jury, unless it was instituted, not only maliciously, but also without probable cause. "Neither of these elements alone will do, but both must concur to make the defendant liable."—*McLeod v. McLeod*, 73 Ala. 42; 2 Greenl. Ev. § 453. The fact that a person entertains malice towards another, does not debar him of his legal right to put in motion a justifiable prosecution against the latter.

While malice—which, in its legal acceptation, implies any improper or wrongful motive, rather than actual malevolence—

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may be inferred from the want of probable cause, the converse of this is not true; for it is settled law, that "from the most express malice the want of probable cause can not be implied."—2 Addison Torts, § 853; Cooley on Torts, 185.

In *McLeod v. McLeod*, 73 Ala. 42, we gave many approved definitions of probable cause, to which we need add nothing. It is clear, from the weight of authority, that it involves not only an honest belief on the part of the prosecutor that the plaintiff was guilty of the offense charged, but it must also have been a belief based upon reasonable grounds, as opposed to one founded, as was said in *Long v. Rodgers*, 19 Ala. 321, upon "the caprice, prejudice, or the idle dreams of the prosecutor."—*Frowman v. Smith*, 12 Amer. Dec. 265, note; *Bacon v. Towne*, 4 Cush. 238. There can be no justification, without honest belief, coupled with, and supported by reasonable grounds.—*Shawl v. Brown*, 28 Iowa, 37; s. c., 4 Amer. Rep. 151; 1 Hilliard on Torts, 474; *McLeod v. McLeod*, 75 Ala. 484.

The record raises the inquiry, as to how far a defendant is protected by the advice of counsel in instituting a prosecution. While it is true, as sometimes stated, that no man can shelter his malice by showing that he has brought an unfounded prosecution under the advice of a weak, or ignorant man, yet it is now everywhere conceded, that, where the prosecutor has fully and fairly submitted to learned counsel all the facts which he knows, or by proper diligence could know to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and, acting in good faith upon such opinion, he does institute such proceeding, he can not be held liable in an action for malicious prosecution, although the legal opinion given him be erroneous. According to some of the authorities, this evidence is competent to rebut malice, and, according to others, to establish the fact of probable cause. In *Blunt v. Little*, 3 Mason's Rep. 102, Mr. Justice STORY expressed the opinion, that such evidence was admissible both "for the purpose of rebutting the imputation of malice, and establishing probable cause." But, which ever view be correct, it is generally agreed, that it furnishes a complete defense to the whole action, and is not limited to a mitigation of damages.—*McLeod v. McLeod*, 73 Ala. 46, *supra*; 2 Greenl. Ev. § 459; Cooley on Torts, 183–184; *Brobst v. Ruff*, 100 Penn. St. 91; s. c., 45 Amer. Rep. 358; *Chandler v. McPherson*, 11 Ala. 916; *Stone v. Swift*, 4 Mass. 389; *Frowman v. Smith*, 12 Amer. Dec., note, p. 266, and cases cited; *Griffin v. Chubb*, 58 Amer. Dec. 85; s. c., 7 Tex. 603; *White v. Carr*, 36 Amer. Rep. 353; s. c., 71 Me. 585.

It is not necessary that the facts should have clearly warranted such legal advice. If this were so, then the professional



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advice would be entirely useless for any purpose, because the defense would be complete without it. A qualification of the rule in this way, as said by Underwood, J., in *Walter v. Sample*, 25 Penn. St. 275, "destroys the rule itself." The learned judge further observed, "Professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause, is the very question submitted to counsel in such cases; and when the client is instructed that they do, he has taken all the precautions demanded of a good citizen." The rule has been held not to apply to counsel who was interested in the subject-matter of the suit (*White v. Carr*, 36 Amer. Rep. 358); nor to embrace a mere justice of the peace, who was not a licensed attorney. *Brobst v. Ruff*, 45 Amer. Rep. 358. But it applies with much force where a prosecutor acts under the advice of an authorized officer of the law, whose duty it is to conduct criminal prosecutions.—*Thompson v. Lumley*, 50 How. Prac. 105.

We have said that the prosecutor must submit to counsel all the facts bearing on the case, of which he has knowledge, or which he could have ascertained by reasonable diligence. This embraces, of course, only material facts which are relevant to the case in question. If the prosecutor consented to the sale of the mortgaged property, this was a material fact, relieving the act of sale of all criminality, even if the mortgage was valid.—Code, 1876, § 4354. This fact, if true, should have been stated, and a failure to disclose it would deprive the prosecutor of any protection which he might otherwise derive from the advice of the county solicitor, whom he is shown to have consulted.

But it was not at all material that the mortgage may have been satisfied since the alleged unlawful act of sale. If the sale was criminal as a misdemeanor when committed, it could not be purged of its criminality by any subsequent act of the parties. The right of the mortgagee to prosecute, if it existed at all, would be the same after satisfaction of the mortgage as before. It has never been contended that an act of larceny could be purged by restoration of the stolen property, or embezzlement by returning the funds which may have been fraudulently converted. The cases are clearly analogous.

The records of the County Court, which were introduced in evidence, showed a termination of the prosecution. It was the province of the court to construe these records, and their legal effect should not have been submitted to the jury for

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their determination.—*Ala. Gr. So. R. R. Co. v. Hawk*, 72 Ala. 117.

There are some other points raised by the rulings of the court, which have not been argued by counsel, and which we need not consider, as they involve familiar questions often decided by the court.

The judgment is reversed, and the cause remanded.

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### *Action by Lessee for Breach of Covenants in Lease.*

1. *Measure of damages for breach of contract, generally.*—As to the measure of damages for a breach of contract, the general rule of the common law is one of indemnity, intended to give compensation for the loss sustained, and, as far as practicable, to put the plaintiff in the same condition he would have been if the contract had been fully performed.

2. *Same; as between vendor and purchaser.*—As between the vendor and the purchaser of land, where the former is unable to make title, but is guilty of no fraud or wrongful conduct, the purchaser can only recover the purchase-money paid, with interest; but this rule is exceptional, and does not apply to sales of personal property, nor to executory sales of land.

3. *Same; as between lessor and lessee.*—As between lessor and lessee, where the latter sues for the breach of an express stipulation to put him in possession, the general rule must govern, though the lessor was guilty of no fraud or wrongful conduct; and the measure of damages is, not the consideration paid, with interest, but the value of the lease.

4. *Same; proof of value of crops.*—The leased premises consisting of a meadow of about thirty acres, sown in "Johnson grass," a crop of which was then ready to be mowed, the plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value of each crop; not as a basis for the recovery of profits as such, but as facts to be considered by the jury in estimating the value of the use of the land during the term—that is, the value of the lease.

5. *Admission of evidence generally.*—When evidence is offered and admitted generally, no specific purpose being mentioned, and it is admissible for any legal purpose, it will be presumed to have been admitted for that purpose, unless the bill of exceptions shows the contrary.

6. *Trespass on leased premises by stranger.*—When the possession of the leased premises is open and unobstructed at the time of the renting, and there is only an implied covenant on the part of the lessor that they shall be open to entry, a subsequent trespass or intrusion by a third person is a wrong against the lessee; but, if there is an express stipulation by the lessor to put the lessee in possession, such subsequent trespass, before the lessee has entered, is a wrong against the lessor.

7. *What constitutes partnership; who are proper parties plaintiff.* When the lessee of land contracts in his own name, but one-half of the money paid in cash is furnished by a third person, under an agreement

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between them that he shall become a partner if the lessee acquires possession; this does not constitute a partnership between them, possession never having been obtained, and does not prevent the lessee from maintaining an action in his own name alone for a breach of the stipulation for possession.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. S. H. SPROTT.

This action was brought by H. C. Reynolds against Frank R. King, and was commenced on the 31st July, 1878. The complaint, as amended, contained three counts, each of which claimed damages for an alleged breach of covenant or stipulations contained in a verbal lease of a tract of land, rented by plaintiff from defendant on the 8th May, 1878, for the remainder of the year; the consideration or agreed price being \$300, of which sum \$250 was paid in cash, and the plaintiff gave his note for the remaining \$50. The leased premises consisted of a field containing about thirty acres, on which a crop of "Johnson grass" was growing. The first count of the amended complaint alleged that defendant, for the consideration specified, agreed to allow and permit plaintiff to gather and use the crop of grass then growing on the land, and all that might grow during the remainder of the season, which was of great value; and that said defendant did afterwards, during the season while said grass was growing, "violate the said agreement by refusing and preventing plaintiff from mowing and gathering said grass." The second count alleged that the land was valuable for hay, the net profits from which would have amounted to \$1,000; "that by the terms of said agreement defendant undertook and promised to put plaintiff in possession of said field, and to allow him to enjoy the same during said year; that plaintiff demanded of defendant the possession of said land, and defendant did not comply with said demand, but failed to put plaintiff in possession, whereby plaintiff was deprived of getting possession, and gathering the crops on said land during said term." The third count alleged that, "at the date of said agreement of renting, the defendant was in the possession of said land, and, contrary to the stipulations of said contract and agreement, retained the possession during the said term of renting, and would not allow plaintiff to enter upon said land during said term," &c., whereby the crops of grass were wholly lost to plaintiff. There was a demurrer to the third count, which was overruled; but the record does not show what causes of demurrer, if any, were specifically assigned. The defendant pleaded "the general issue, in short by consent, with leave to give in evidence anything that can be well pleaded;" and the cause was tried on issue joined on this plea.

On the trial, as appears from the bill of exceptions, the



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plaintiff introduced one McMath as a witness, with whom, acting as agent for the defendant, the contract of renting was made, and who testified to the terms of the contract as stated; also, that he received the money and note from plaintiff for the rent as stipulated, and sent them to defendant, who thereupon ratified what he had done. He further testified as follows: "At the time of renting said land, plaintiff said to him, that he must put him in possession; to which he (witness) responded, that he would, and that he would go and see Webb Shortridge about it; and witness thereupon went off to where said Shortridge was, a short distance off in the town of Montevallo, and told him that he had rented the land to plaintiff, and wanted to put plaintiff in possession of the same. Shortridge got very angry at this, and replied, in an angry manner, that plaintiff should not have the possession of the field, and should not cut the grass off the same; that he intended to cut it himself, and would shoot any man who attempted to go upon the land; that he had possession of the field, and intended to keep it. This conversation was immediately reported to plaintiff, and plaintiff did not get possession of the land, but the grass was cut by said Shortridge. It was admitted that said Shortridge was a nephew of the defendant, and lived in the dwelling-house on defendant's farm, of which said field was a part, and about a half-mile from said field; and that he lived at the same place the year before, and had control of the entire plantation, including said field. Said witness testified, also, that Shortridge commenced to cut the grass the next day, and remained in possession of the land for the balance of the year 1878." Another witness for the plaintiff testified to facts showing that Shortridge claimed and had possession of the field during the year 1878; and the plaintiff, testifying as a witness for himself, stated that, on the day after the renting, Shortridge came to him, having a double-barreled gun, asserted his possession of the land, and threatened to kill plaintiff if he attempted to enter. It was proved, also, that the defendant was notified of the conduct and declarations of said Shortridge, and that he offered, some time in July, 1878, to rescind the contract with plaintiff, returning the money and the note; but plaintiff refused to accept the proposal." The defendant, testifying as a witness for himself, stated, "that he did not rent said field to said Shortridge, and Shortridge was not his agent in 1878; that he had not given Shortridge any right, authority, control or possession of said field, at any time in 1878; and that Shortridge's interference with said field, after it was leased to plaintiff, was without authority from him, and against his wishes." The plaintiff testified, also, that of the money paid by him in cash on the lease, one half was money which he

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owed to one Charles S. Rowley; "that there was an understanding between him and Rowley at the time, that if he succeeded in renting, and got possession of the land, they were to cut and share the grass in partnership, and that the terms of the partnership were to be agreed on and put in writing after he had secured said field; and that no such agreement was ever consummated, as he never obtained possession thereof."

The witness McMath testified, also, "that a fine crop of grass was growing on the land at the time of said renting, and was ready to be cut; and that it was worth at the time, standing on the land, \$300." This evidence was admitted without objection, so far as the bill of exceptions shows; but afterwards, during the further examination of the witness, plaintiff having asked him, what the standing crop was worth, how many crops could be grown on the land each year, with ordinary seasons, the quantity of each crop, the market value of the grass as hay, and the net profit per ton, the defendant objected to each question and answer, and duly excepted to the overruling of his several objections. The witness answered, in substance, that the land would produce each year, with ordinary care and attention, and ordinary seasons, four crops of hay, averaging twenty-five tons each; that the market price of the hay was about \$20 per ton, and that the net profit was \$10 per ton. The bill of exceptions contains, also, these remarks: "The evidence tended to show, also, that the market value of the lease was from \$300 to \$600. . . . The evidence tended to show, also, that the market value of the lease to the plaintiff on the 8th May, 1878, was \$300."

"The foregoing was all the evidence adduced on the trial of this case, and the court thereupon charged the jury, among other things, as follows: If the jury believe, from the evidence, that Shortridge was in possession of the field at the time of the renting to plaintiff, and that McMath, as the agent of defendant, when renting said land to plaintiff, agreed to put him in possession of the same; then it was the duty of defendant, or his said agent, to comply with this agreement."

The defendant excepted to this charge, and requested the following charges in writing, each of which was refused, and exceptions duly reserved to their refusal:

1. "If the jury believe, from the evidence, that McMath was the defendant's agent to rent the field, and did rent it to the plaintiff, then such renting would put an end to any agency that Shortridge might have had as to that field; and if said Shortridge, after such renting, interfered with the plaintiff's enjoyment of the renting, such interference would be a trespass, for which the defendant would not be responsible."

2. "If the jury should find for the plaintiff, and should be-

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lieve from the evidence that the defendant was not guilty of any fraud or wrongful conduct in the matter, then they will find for the plaintiff the amount he paid for the lease, with interest to this time."

3. "If the jury believe, from the evidence, that the defendant gave no authority to Shortridge to exercise any acts of possession over the field in controversy, and that Shortridge was not his agent as to this particular field; then Shortridge's entry upon the said field, claiming possession, was a trespass; and unless said Shortridge was present, in person or by his representative, upon said field, at the time of the making of said lease, resisting, or attempting to resist plaintiff's entry upon said field, then they must find for defendant."

4. "If the jury believe, from the evidence, that at the time of the making of the contract of lease, upon which this action was brought, it was understood and agreed between plaintiff and Charles S. Rowley that said Rowley was to share with plaintiff in the benefits of said lease; then plaintiff is not entitled to recover in this case."

5. "If the jury believe, from the evidence, that one half of the money paid to King for the lease was furnished by said C. S. Rowley, and that plaintiff was authorized by said Rowley to pay this money on said lease, under an agreement between them that he was to share with plaintiff in the benefits of said lease; then plaintiff can not recover in this action."

The charge given, the refusal of the several charges asked, the rulings on evidence to which exceptions were reserved, and the overruling of the demurrer to the third count of the amended complaint, are here assigned as error.

The appellant died while the case was pending in this court, and the appeal was revived in the name of Alex. Snodgrass as his administrator.

S. F. RICE, E. P. MORRISSETT, and PORTER & MARTIN, for appellants.—(1.) The defendant is not liable at all, under the facts shown in this case. A covenant or stipulation for quiet enjoyment, whether express or implied, means that the tenant shall not be evicted by the lessor himself, or persons holding under him, nor by title paramount; and it is not a warranty against the tortious conduct of third persons.—Taylor's Landlord and Tenant, § 305; Sutherland on Damages, 146. (2.) If liable at all, he can only be required to refund the money paid, with interest; as he was guilty of no fraud or wrongful conduct in keeping plaintiff out of possession, and the action is not founded on a charge of fraud.—*Kelly v. Dutch Church*, 2 Hill, N. Y. 116; *Flurean v. Thornhill*, 2 W. Bla. 1078; *Driggs v. Dwight*, 17 Wend. 71; Suth. Damages, vol. 3, p. 146;



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4 Kent's Com., mar. 477; Wait's Actions & D., vol. 2, p. 463; Taylor's L. & T., § 317, notes; *Noyes v. Anderson*, 1 Duer, N. Y. 342; *Kinney v. Watts*, 14 Wend. 38; 4 Denio, 546; 8 Gratt. 16; 42 N. Y. 167; 11 Penn. 139; 14 Pick. 128; 4 Mass. 108; 4 Cush. 14. (3.) The evidence offered and admitted to prove the amount, value and net profits of the crop, not which were raised during the term, but which might be raised during ordinary seasons, ought to have been excluded. *Sims v. Glazener*, 14 Ala. 695; *Burton v. Holly*, 29 Ala. 18; *Donnell v. Jones*, 13 Ala. 490; *Higgins v. Mansfield*, 62 Ala. 267; *Pollock & Co. v. Gantt*, 69 Ala. 573. (4.) The demurrer to the third count ought to have been sustained.—Authorities above cited.

H. C. TOMPKINS, and HENRY WILSON, *contra*.—The plaintiff's right to recover in this case was settled by the former decision. 67 Ala. 229. The measure of his damages was, at least, the value of the lease during the term; and any fact which tended, in any degree, to shed light on that question, was admissible as evidence.—*Chatterton v. Fox*, 5 Duer, 64; *Engel v. Fitch*, L. R. 3 Q. B. 314; *Williams v. Oliphant*, 3 Ind. 271; *Adair v. Boyle*, 20 Iowa, 238; *Driggs v. Dwight*, 17 Wend. 71; *Field v. Granger*, 4 Selden, 115; *Woodbury v. Jones*, 44 N. H. 206; Th. Raym. 77; 3 Suth. Damages, 155–57. If plaintiff had bought only the standing crop of grass on the land, and had been prevented from gathering and saving it, he would have been entitled to recover the market value of that crop, less the expenses of cutting, saving, and carrying it to market—that is, its net market value; and having bought all the crops that might be grown on the land during the term, he might have asked for the reasonable profits he would probably have made out of the contract.—*Hinckley v. Beckwith*, 13 Wise. 31; *Dobbins v. Duquid*, 65 Ill. 464; *Dexter v. Manley*, 4 Cush. 14; *Allison v. Chandler*, 11 Mich. 542; *Shafer v. Wilson*, 44 Md. 268; *Herring v. Skaggs*, 62 Ala. 188; *Culver v. Hill*, 68 Ala. 66; *Robinson v. Bullock*, 66 Ala. 548. The rule as to the measure of damages between vendor and vendee, prevailing in England and elsewhere, has never given satisfaction, and it does not apply to such a case as this. L. R. 3 Ex. 44; 42 N. Y. 167.

CLOPTON, J.—The defendant requested the following instruction: "If you should find for the plaintiff, and should believe from the evidence that the defendant King was not guilty of any fraud, or wrongful conduct in the matter, then you will find for the plaintiff the amount he paid for the lease, with interest to this time." When referred to the evidence,

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the proposition of this charge is, that in an action by the lessee, for the breach of an express term in the contract to put the lessee in possession, the measure of damages, in the absence of fraud or wrongful conduct, is the consideration paid for the lease, with interest.

The general common-law rule, as to the measure of damages for the breach of a contract, is one of indemnity; intended to give compensation for the loss sustained, and to put the party, as nearly as practicable, in the same condition in which he would have been *had the contract been performed*. In an action against a vendor, for a failure or refusal to perform a contract for the sale of personal property, the measure of damages is the difference between the contract and market prices at the time of the breach. An exception to the general rule, in favor of a vendor of real property, who, from inability to make title, fails to perform his contract of sale and conveyance made in good faith, was first admitted in *Flurean v. Thornhill*, 2 W. Bla. 1078; where it was held, that in such case the vendee could recover only the amount of payments made, with interest and costs. The doctrine of this case has been followed in many subsequent cases, and may be regarded as the settled rule in England. It has been adopted in this and many other States. In *Bibb v. Freeman*, 59 Ala. 612, the purchase-money, with interest, was held to be the measure of damages, in a recovery based on a broken contract of seizin; and in *Kingsbury v. Milner*, 69 Ala. 504, the same measure of damages was applied in a broken contract of warranty.

The rule in *Flurean v. Thornhill* is an admitted exception to the general rule—its effect being to put the purchaser in the condition he would have been *had no contract been made*. It has not generally been satisfactory to the courts, and has been repudiated by many; and individual members of courts which have followed it, while yielding to the weight of authority, have expressed dissatisfaction. Frequent attempts have been made to restrict its application, or to relax or modify it in particular cases. If the vendor is guilty of wrongful conduct, he is generally regarded as without the benefit of the rule, and liable for compensatory damages; though it has been sometimes said, that in such case the action should be founded on the *tort*. The rule may now be regarded as “confined to cases of inability to perform, arising from a discovery, after the contract, of a previously unsuspected defect in the vendor's title.”—*Pumpelly v. Phelps*, 40 N. J. 60; *Drake v. Baker*, 34 N. J. L. 358; *Stevenson v. Harrison*, 3 Litt. 170; 2 Suth. on Dam. 207.

Counsel for appellant strenuously insist, that the rule as between vendor and vendee ought to be applied between lessor

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and lessee. The contention is founded on analogy, based on the doctrine that a lease for a defined term is, in its nature, a sale of an interest in the land *pro tanto*. And our attention has been called to the decisions in New York, in which the rule was applied to cases of eviction of the tenant; and it was held that the rents reserved, when no other consideration is paid, are regarded as a just equivalent for the use of the demised premises. These decisions rest the rule on the assumption, that the parties agree on the rent reserved as the value of the lease; and as the rent ceases on eviction, "the lessee is relieved from a burden which must be deemed equal to the benefit which he would have derived from the continued enjoyment of the property."—*Kelly v. Dutch Church*, 2 Hill, 105; *Noyes v. Anderson*, 1 Duer, 342. This court is urged to follow the New York decisions.

When this case was before us on a former appeal (67 Ala. 229), there was no proof that the defendant expressly bound himself to put the plaintiff in possession. On the record as then presented, it was said: "The prime motive of the contract is, that the lessee shall have possession; as much so, as if a chattel were the subject of the purchase. Delivery is one of the elements of every executed contract." On the last trial, there was evidence tending to show that one of the express terms of the contract was, that defendant should put plaintiff in possession. If this evidence be believed, until the plaintiff was put in possession, the contract remained unexecuted; it was an executory lease of the premises. Being executory, if we follow analogy, the damages must be assessed on the same principle as in cases of executory contracts for the sale and conveyance of land.

Courts, which have followed the doctrine in *Flurean v. Thornhill*, have applied the general, instead of the exceptional rule, in actions founded on executory contracts. In *Taylor v. Barnes*, 69 N. Y. 430, ALLEN, J., alluding to the rule which limits the recovery to the consideration, says: "But it is not applied in cases of executory contracts, where the vendor has sold lands to which he has not a perfect title, where he undertakes to complete and perfect it. In this case, there is an express agreement for indemnity; and a recovery, which does not give the vendee the benefit of his bargain, and the value of his purchase, does not indemnify him against loss. The true rule of damages, as a measure of indemnity in such case, is the value of the land at the time of the eviction, or other breach of the contract, with interest from that time." And *this* court has held, that in actions on executory contracts for the sale of lands, the measure of damages is the value of the land at the time of the breach.—*Whitesides v. Jennings*,



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19 Ala. 784; *Pinkston v. Huie*, 9 Ala. 252; *Lewis v. Lee*, 15 Ind. 499.

Where the exceptional rule between vendor and purchaser is not extended, the general rule as to the measure of damages in an action against the landlord, where possession has never been delivered, or the tenant has been evicted by a paramount title, is the difference between the rent reserved and the value of the land for the term.—*Adair v. Bogle*, 20 Iowa, 238; *Dexter v. Manley*, 4 Cush. 14; *Dobbins v. Duquid*, 65 Ill. 464; *Newbrough v. Walker*, 8 Gratt. 16. In England, courts which followed the exceptional rule, have refused to apply it between lessor and lessee. The exceptional rule has been repudiated except as between vendor and vendee, and the general rule applied in actions on broken covenants in contracts of lease. In *Locke v. Furze*, 19 C. B. N. S. 96, BYLES, J., in respect to the rule says: "That is an anomalous rule, confined, for the sake of convenience, to the case of vendor and purchaser. In all other cases of breach of contract, the measure of damages is the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract." This case was, on appeal, affirmed in the Exchequer Chamber, L. R. 1 C P. 441. MARTIN, B. says: "It is clearly an exception; it is contrary to the rule of the common law; it had not the unqualified approval of Lord TENTERDEN; and I see no reason why it should be extended." And CHANNELL, B. observes: The testator expressly bargained for that which he could not perform; and therefore, I think, the proper principle, upon which the damages should be assessed, is a full compensation to the plaintiff for that which he has lost, not limited to the amount actually paid by him." Where the lessor had given a covenant for quiet enjoyment, and the lessee was evicted, it was also held in *Williams v. Burrell*, 50 E. C. L. 401, that he was entitled to recover the value of the term. And in *Trull v. Granger*, 8 N. Y. 115, it was held, that the tenant may maintain an action for damages upon the implied agreement of the lessor to yield him possession, or in *tort* for the violation of the duty arising from the relation of landlord and tenant; and that the measure of damages, in either case, is the difference between the rent reserved, and the value of the premises for the term. It is true that, in this case, the lessors denied the right of possession.

The record exculpates the lessor from any fraud, or wrongful conduct. It appears that he was not only willing, but made efforts to perform his contract. We have already said, that a distinction has been recognized, where the vendor is innocent, and where he is guilty of wrongful conduct. Without discussing the sufficiency of the grounds on which this difference

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rests, we can perceive no substantial reason for its extension to contracts between lessor and lessee. Whether the lessor acted from a bad motive, or in good faith, the *actual pecuniary* damage to the lessee is the same in either case.—*Doherty v. Dolan*, 68 Me. 87; *Walker v. Moore*, 10 B. & C. 416. The defendant bargained for that which he was unable to perform—to put the plaintiff in possession—and on principle, he is bound to make compensation to the plaintiff for the loss he has sustained.

The grounds on which the rule as between vendor and vendee is founded, have been, as assigned by one of the justices in the leading case, an implied condition that *the vendor has good title*; and also, as stated by subsequent justices, the uncertainty, arising from the complications of the law, that the vendor can effectively make a good title, and the vendee taking the property with that knowledge. It has also been said, that the rule finds its defense “in considerations of public policy, since the amount of damages, necessary to compensate the vendee, might in some cases ruin an innocent vendor.” Neither of the grounds exists, nor do the considerations of public policy apply, in the matter of a lease. Though a lease for a defined term may be, in its nature, a sale of a partial, limited interest in the land, it is not a freehold, but a chattel—the right to possess and use for the specified term. It seems, on reason, that the *general* rule, which governs in actions on contracts for the sale of specified chattels, is more appropriate, and more largely meets the measure of compensation, than an *exceptional* rule admitted on grounds and considerations confessedly peculiar to vendor and vendee. There can be no difference in principle, whether the contract be for the sale of personal property, or for the possession and use of real *property* for a year or term of years.—*Hopkins v. Lee*, 6 Wheat, 109.

We do not wish to be understood as expressing or intimating a desire or purpose to disturb the rule as between vendor and vendee, which, from its long existence, may be regarded as a rule of property. What we have said in respect to it has been as bearing on the question of its extension to cases other than those in which it was first admitted. Though there is no intent to interfere with the rule as now confined, we can see no sufficient reason to extend it to cases other than vendor and purchaser. Such extension would be the extension of an exceptional, and, it may be said, arbitrary rule—engrafting exceptions on a general rule, which are not founded on pressing reasons, or a necessity to promote the ends of justice. Such extension would transgress the purpose of courts to carry out contracts as made by the parties, and not to make contracts for them, by implying conditions not expressed, and not justified by any authorized legal interpretation. Especially are we un-

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willing to admit it in a recovery based on the breach of an express term of a contract of lease to put the tenant in possession. If the lessor chose to absolutely agree to deliver possession, he must be held responsible for his failure, though he may have acted in ignorance of an adverse occupancy, or, if aware of it, relied on his ability to remove the obstruction. In such case, the general rule must govern. Anything less will not compensate the lessee for the loss of his bargain.

The plaintiff was allowed to prove, against the defendant's objection, that the leased premises would probably yield, with ordinary and average seasons, four crops of hay annually; and also the probable quantity and market value of such crop. We do not understand that the evidence was offered or admitted as a basis for the recovery of profits, *as such*, but as facts from which the jury might draw a conclusion as to the value of the lease. The competency of such evidence, when offered for this purpose, should, on reason, be governed by the same principle as the admissibility of proof of profits, when their loss constitutes the measure of damages. While profits, when contingent or speculative, or when their loss is not the natural and proximate result of the breach of a contract, are not recoverable, they are allowed when they form a constituent element of the contract, and the amount can be estimated with reasonable certainty from established data.—*Brigham v. Carlisle*, 78 Ala. 243. So, in order that profits may constitute the basis of a legitimate inference as to the value of the use of leased land, they must have been an element of the contract, and there must be established *data* from which the amount can be ascertained with reasonable certainty.

The land was a meadow of about thirty acres, sown in what is commonly known as "Johnson grass." At the time of the leasing, there was a crop ready to be mowed. The condition of the land, and of the crop of grass growing thereon, and the kind, nature, and usual productive capacity of the grass, established *data*, from which the quantity of annual yield can be ascertained with reasonable certainty. It is different where land is leased for general and undefined agricultural purposes. That the land was sown in grass, one crop of which was matured, and the probable amount of production, were elements of the value of the lease. A party is not confined to proof of value by the opinion of witnesses; it may be proved by facts and circumstances. The state of the land, the kind of grass in which it was sown, the annual yield in the usual course of nature, and the market value, were facts proper to be considered by the jury in estimating the value of the use of the land for the term—the value of the lease.—*Dexter v. Manley*, 4 Cush., *supra*.



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The bill of exceptions does not show for what special purpose the evidence was offered, nor what instructions were given as to the measure of the damages. We must, therefore, presume that the evidence was received for an admissible purpose, if admissible for any object, and that the instructions were in accordance with law.

If it be conceded, that the charge requested, as to the effect of an interference by a stranger after the renting, asserts a correct legal proposition, on the hypothesis, that there was an implied covenant that the premises shall be open to entry, it ignored material facts, which the evidence tended to show, and which rendered an explanation or qualification of the charge necessary to prevent misleading. If the possession is open and unobstructed at the time of renting, and there is only an implied covenant that the premises shall be open to entry, a trespass thereafter by a stranger is a wrong against the lessee.—67 Ala. 229. But, if there be an express term of the contract, that the lessor shall put the tenant in possession, a trespass by a stranger, before the tenant is put into possession, is a wrong against the lessor. The charge is restricted to an interference *after the renting*, without respect to the fact or time of putting the tenant into possession. As the legal effect of such interference is met and avoided by other facts, which there is evidence tending to show, the charge was properly refused.—*McLemore v. Nuckolls*, 37 Ala. 662.

There was no proof that Rowley was a co-partner, or joint adventurer with plaintiff. The evidence shows that he furnished half of the money, with which the plaintiff made the cash payment, and that he was to become a partner if the plaintiff obtained possession. But the plaintiff never obtained possession; and if the only evidence on the question be believed, there was no co-partnership. The charges asked, that plaintiff could not maintain the action without joining Rowley as co-plaintiff, based on the hypothesis that he furnished a part of the money, were abstract, and properly refused.—*Thrash v. Burnett*, 57 Ala. 156; *Beasley v. State*, 59 Ala. 20; *Bain v. State*, 61 Ala. 75.

Affirmed.

## Gilmer v. Wallace.

### *Bill in Equity for Injunction of Sale under Mortgage, or for Redemption.*

1. *Revision of chancellor's decision on facts.*—The settled rule of this court, in reviewing the chancellor's decision on facts, is not to reverse unless clearly convinced that he erred.

2. *Same ; mortgage held satisfied, and sale under power enjoined.*—On consideration of the voluminous testimony contained in the record in this case, which is conflicting and irreconcilable, and applying to it the settled rule which governs this court in revising the chancellor's decision on disputed questions of fact, the court is satisfied that the chancellor erred in his decree, and that the mortgage was in fact satisfied ; and therefore reverses the chancellor's decree, and here renders a decree perpetuating the injunction against the sale under the mortgage, and ordering satisfaction to be entered of record as prayed.

Appeal from the Chancery Court of Lawrence.

Heard before the Hon. THOMAS COBBS.

The original bill in this case was filed on the 11th January, 1882, by William Gilmer, against W. K. Wallace, and H. C. Speake ; and sought to enjoin a sale of certain lands by said Speake, as trustee under a deed of trust executed by the complainant to secure a debt which he owed to said Wallace, and to have satisfaction of the deed entered of record, on the ground that the debt was paid and satisfied ; or, if any thing should be yet due, for an account and redemption, and also for general relief. An answer to the bill was filed by Wallace, denying the fact of payment, and his answer was adopted by Speake, the trustee. On final hearing, on pleadings and proof, the chancellor dismissed the bill, on the ground of variance between the allegations and the proof as to the facts relied on as constituting a payment ; but his decree was reversed by this court on appeal, and the cause was remanded, in order that the complainant might be allowed an opportunity to amend his bill. 75 Ala. 220. The bill was afterwards amended, obviating the supposed variance ; and the cause being again submitted for final decree on pleadings and proof, the chancellor again dismissed the bill, but on the ground that the complainant had failed to establish his case. The chancellor's decree is now assigned as error.

W. P. CHITWOOD, and CABANISS & WARD, for the appellant.

WM. COOPER, and THOS. M. PETERS, *contra*.

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STONE, C. J.—In reviewing a chancellor's ruling on facts, our rule is not to reverse, unless we are clearly convinced he has fallen into error.—*Rather v. Young*, 56 Ala. 94; *Nooe v. Garner*, 70 Ala. 443; *Butts v. Broughton*, 72 Ala. 294; *Wilkinson v. Searcy*, 74 Ala. 243.

We have read the voluminous testimony in this record with very great care. There is conflict, and any attempt to reconcile it would be fruitless. There is great forgetfulness, or grievous fault. We will not attempt to collate or dissect it, for any such attempt would lead to criticisms we prefer not to make. Human memory is often treacherous, and human judgment is not infallible. Still we must pronounce on the testimony before us, let the result be what it may. Many a just demand has failed for want of proof, or has been hampered by a network of circumstances from which it could not be extricated. As we have said, we will not comment on the testimony. It clearly convinces us the chancellor erred in his finding on the facts.—*Gilmer v. Wallace*, 75 Ala. 220.

The decree of the chancellor is reversed, and a decree here rendered, granting to complainant relief, and reinstating and perpetuating the injunction. This cause will be remanded to the court below, with directions that that court require the defendant, William K. Wallace, to produce the note and mortgage of April, 1872, before the court, that the same may be then and there cancelled; and the costs of the court below are adjudged against the defendant, William K. Wallace.

Reversed and remanded.

## **Birmingham & Pratt Mines Street Railway Co. v. Birmingham Street Railway Co.**

*Bill in Equity for Injunction between Street Railway Companies.*

1. *Injunction against invasion of private franchise.*—A court of equity has undoubted jurisdiction to restrain, by injunction, an invasion of a franchise lawfully granted, on valuable consideration, by a person or corporation claiming under a subsequent invalid grant.

2. *Constitutional protection to franchises granted by corporations.*—A franchise granted by a municipal corporation, on valuable consideration, by an ordinance in the nature of a contract, if legal, is within the protection of the constitutional provision against laws impairing the



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obligation of contracts; and it can neither be taken away by the repeal of the ordinance, nor impaired by a subsequent grant of such franchise to another.

3. *Municipal corporations; powers of.*—Municipal corporations can only exercise such powers as are expressly granted in their charter, or such as may be necessary and proper to carry the express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created; and any reasonable doubt as to the existence of a power claimed to be conferred by the charter, will be resolved against the corporation.

4. *Grant of exclusive franchise, in perpetuity, to street railway company.*—Neither the charter of the city of Birmingham, nor the general statutes, confer on that corporation the power to grant, by ordinance in the nature of a contract, the exclusive franchise in perpetuity of running a street railway through certain designated street and avenues of the city; and if such power were granted by its charter, or by any public statute, it would be violative of the constitutional provision (Art. I, § 23) against the passage of any law “making any irrevocable grant of special privileges or immunities.”

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed on the 19th day of March, 1886, by the Birmingham Street Railway Company, a private corporation, against the Birmingham and Pratt Mines Street Railway Company, also a private corporation, and the several persons composing it; and sought to enjoin and restrain the defendants from attempting to operate or construct a street railway on “Eighteenth street” and “Avenue B South” in the city of Birmingham, or otherwise interfering with the complainant’s alleged exclusive right to a railway along or through said streets. The complainant claimed this exclusive right under a written contract, a copy of which was made an exhibit to the bill, in these words:

“This contract, made and entered into this 19th May, 1882, by and between the mayor and aldermen of the city of Birmingham, parties of the first part, and Ben. F. Roden, W. H. Morris and associates, parties of the second part, *witnesseth*, that for and in consideration of the terms, covenants and agreements herein stated, and the further sum of one dollar each to the other paid, the receipt whereof is hereby acknowledged, the parties hereto contract and agree as follows: (1st.) The parties of the first part hereby grant to the parties of the second part and their assigns the rights and privileges of surveying, locating, constructing, equipping, and to operate a street railway in and along the streets and avenues of said city of Birmingham, Alabama, and over and along the following streets, avenues, and parts of said city, to-wit: The exclusive right to construct and operate a street railway, with the necessary and proper turn-outs and side-tracks for the same, over and upon

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Fourteenth, Eighteenth, Nineteenth, Twentieth, Twenty-fourth [streets], and First, Second, Third, Fourth and Fifth avenues north, and avenues A, B, C, D and E, south; *provided*, the exclusive right herein granted shall not apply to such of said streets and avenues as are not occupied by the party of the second part within ten years from the date of this contract. (2d.) The party of the first part further agrees to pass such ordinances as may be necessary for the proper running and safety of the tracks and property of the said party of the second part; and to prohibit wagons, hacks, drays, and other vehicles, from standing upon, or in the way of the tracks or cars of said party of the second part. (3d.) The parties of the second part agree to at once organize themselves into an incorporated company under the laws of Alabama, and the rights and privileges herein granted are to be transferred to said company when so incorporated. The parties to the second part further agree and obligate themselves to construct and operate said street railway in such manner [as] to conform with the most improved plans of street railways, as now used in other cities. They agree to charge an amount for passengers not exceeding five cents for each passenger, a fare being considered from one end of the line to the other. The parties of the second part further agree to conform to all just and reasonable regulations of the party of the first part, in regard to running and speed of the cars of said railway; and to hold the city harmless from liability to any person or persons for damages caused by the neglect or carelessness of the party of the second part, their agents or employees. The party of the second part further agrees to begin the construction of said street railway within twelve months from the date of this contract, and to have at least one mile in first-class running order, on or before the first day of January, 1884. In witness," &c.

The bill alleged that this contract was made, and signed by the mayor for the municipal authorities, under authority of an ordinance adopted at a regular meeting of the city council of Birmingham; but the ordinance was not made an exhibit to the bill, nor is it anywhere set out in the record. It was alleged, also, that the defendants claimed to be acting under authority conferred on them by the city council, and had taken the preparatory steps to organize themselves as a private corporation, but had not completed their organization; and the complainants insisted that this grant to the defendants was void, because violative of the prior exclusive grant to complainant. The defendants demurred to the bill for want of equity, on the ground that the exclusive grant to the complainant was void; and they also moved to dissolve the injunction, and to dismiss the bill for want of equity. The chancellor overruled the demurrer and the motions, and his decree is now assigned an error.

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HEWITT, WALKER & PORTER, and J. M. VANHOOSE, for appellant.—The complainant derives its corporate character, rights, powers and franchises, not from its contract with the municipal authorities of Birmingham, but from its incorporation under the general statute.—Code, §§ 1917–29. The general statute does not confer any exclusive right or franchise on a corporation chartered under its provisions; and in providing that the corporation may contract with the proper authorities of any city or town, in reference to the terms and manner in which the road should be used, reference was had only to the rate of speed at which the cars may be run, the kind of rails to be used, the manner in which the track shall be constructed, and other police matters. The General Assembly is prohibited from making “any irrevocable grants of special privileges or immunities,” and could not confer on a municipal corporation a power which is prohibited to itself. So far as the municipal authorities attempt to grant an exclusive franchise, and in perpetuity, the contract or grant is void, and does not hinder a subsequent grant to another corporation or individual.—Const. Ala., art. I, § 23; 2 Dillon on Mun. Corp., §§ 575, 727; *Gas Light Co. v. City Gas Light Co.*, 25 Conn. 19; *State v. Gas Light Co.*, 29 Wis. 454; *State v. Gas Light & Coke Co.*, 18 Ohio St. 262; *Minturn v. Larue*, 3 Miller, 636; *Charles River Bridge v. Warren Bridge*, 12 Curtis, 496; *Mills v. St. Clair County*, 17 Curtis, 707; *Newton v. Comm’rs*, 10 Otto, 548; *Davis v. Mayor of New York*, 14 N. Y. 523; 27 N. Y. 622; *People v. Kerr*, 27 N. Y. 188; *Mayor v. Railroad Co.*, 16 Penn. St. 355; *Comm’rs v. Railroad Co.*, 27 Penn. St. 339; *Gale v. Kalamazoo*, 23 Mich. 344. *Logan v. Pyne*, 43 Iowa, 524; s. c., 22 Amer. Rep. 261; Cooley’s Const. Limitations, 207, 2d ed.; 24 Fed. Rep., No. 7, p. 306.

WEBB & TILLMAN, and R. H. PEARSON, *contra*. (No brief on file.)

SOMERVILLE, J.—The equity of the complainant’s bill in this case depends, in our judgment, upon a single inquiry, and that is, whether the municipal authorities of the city of Birmingham were invested by law with the power to make to the appellee—the Birmingham Street Railway Company—an *irrevocable* grant of the *exclusive* privilege to construct and operate a street railway over and through certain streets and avenues of that city. If the power to grant such a franchise resided in this municipality, and if the franchise has been lawfully granted, upon a valuable consideration, by an ordinance in the nature of a contract, there can be no doubt either of the jurisdiction or of the duty of a court of equity to protect the



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invasion of the right, by issuing an injunction to prevent contiguous competition on the part of the appellants, in their efforts to establish an opposition railway company over any of the same streets or avenues previously included in the grant to the appellee.—1 High on Inj. (2d Ed.), § 902. If, however, the power in question did not exist, then the grant would be void, so far as it purports to be exclusive in its nature; the bill, in such contingency, is without equity, and the court must be pronounced to have erred in refusing to dismiss the bill for want of equity, and in refusing to dissolve the injunction granted at the instance of the complainant.

Before we proceed to discuss the power of the mayor and aldermen of the city of Birmingham to grant such a franchise, we propose to first consider the nature of the thing granted, or the character and terms of the franchise itself.

It bears date on the nineteenth day of May, 1882, was duly enacted by ordinance, and purports to be in the form of a regular contract between the subscribing parties. The privilege granted was the exclusive right to construct and operate a street railway, with the necessary side-tracks and turn-outs, over and upon fifteen designated streets and avenues of the city. The only limitation of this grant, in point of time, is the proviso, that it shall not apply to such of said streets and avenues as shall not have been occupied by the grantee within ten years from the date of the contract. The franchise, it will thus be seen, is one not only exclusive in its nature, but in perpetuity, being without limit of duration, except as to an option to exercise it, which was to continue for ten years. When once put in exercise, it purports to last forever. The main consideration, on the part of the grantee, was the agreement to construct one mile of such railway, and to transport passengers at a fare not exceeding five cents from one end of the line to the other. Certain powers of police and regulation are retained to be exercised by the city, not necessary to be mentioned. For all the purposes of this discussion, we shall consider this franchise as a contract between the mayor and aldermen of Birmingham, and the appellee, such as, if valid and binding, would be fully protected from violation by both the constitution of the United States and of this State, each of which instruments prohibits the passage of any laws by State or municipality impairing the obligation of contracts. So, we shall consider the contention of the appellee as well taken, that if the grant of this exclusive right be obnoxious to no objection, either on constitutional grounds or for want of the charter power to make it, the obligation of the contract would be impaired by the subsequent grant of a similar franchise to the appellant company to build their competing road over and along the street and avenue in-

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cluded in the appellee's franchise, and embraced in this controversy.—*New Orleans Gas Co. v. Louisiana Light Co.*, 15 Wall. 650; *The Binghamton Bridge*, 3 Wall. 52.

The contention of the appellants in this case is, that the contract in question, so far as it purports to grant to the appellee the *exclusive* right to railway privileges over the streets designated, is void for two reasons. First, on the ground that there is no clause in the charter of the city, nor any other law of the General Assembly, which authorizes the making of such a contract; and, secondly, because the contract itself is in violation of section 23 of article I of the Constitution of Alabama, which provides, that no law shall be passed by the General Assembly "making any irrevocable grants of special privileges or immunities." If either of these positions can be successfully maintained, the exclusive feature of the franchise is without warrant of law, and must of its own weight fall to the ground.

The power to make this exclusive grant, which, though not strictly a monopoly, is certainly in the nature of one, must be derived either from some clause in the charter of the city, from the laws of the State, under which the appellee railway company was organized, or from the constitution of Alabama, which is the organic law of the State.

The only section of the present constitution, of 1875, bearing on the subject of street railways, is section 24, of article 14, which provides that "no street passenger railway shall be constructed within the limits of any city or town, without the consent of its local authorities." This is prohibitory, and not permissive in its nature, and confers no franchise or right of any kind on any person or corporation, much less one of an exclusive character. This is not denied, and is too obvious for argument.

The present charter of the city, enacted March 1, 1881, and the one in force at the time of the alleged grant, is silent on the subject of street railways. There is a power conferred in subdivision 18 of section 20, authorizing the city authorities "to regulate and control the running of cars or locomotives upon or across the streets, avenues or alleys of said city, and to regulate and control the speed of such cars, engines or trains, within the corporate limits of the city."—Acts 1880-81, p. 481. The better opinion would seem to be, that this clause has reference only to cars propelled by steam, and not to ordinary passenger street railways, unless drawn by locomotives.—*People's Railroad v. Memphis Railroad*, 10 Wall. 38, 51. But, assuming the opposite to be the correct view, or assuming that the power to regulate and control the running of such cars exists as an incidental police power under other clauses of

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the city charter, which is probable, it is unquestionably true, that such a power confers no right on the city authorities to grant to any person or corporation a privilege exclusive in its character, and without limit as to duration. The authorities in support of this proposition are so numerous and uniform that we will not stop to argue it at any length.—Cooley's Const. Lim. (5th Ed.) 252 (\*207; 1 Dillon on Mun. Corp. (3d Ed.) § 114, § 262; *Logan v. Pyne*, 43 Iowa 524; s. c., 22 Amer. Rep. 261; *City of Chicago v. Rumpff*, 45 Ill. 90; *Milbau v. Sharp*, 27 N. Y. 611; *Davis v. Mayor of New York*, 14 N. Y. 506.

This conclusion is but the logical result of the rule, now so well established, that municipal corporations can exercise only such powers as are expressly granted in their charter, or such as may be necessary and proper to carry such express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created. And any reasonable doubt as to the existence of a power claimed to be conferred by the charter will be resolved by the courts against the corporation, and in favor of the public—*City of Eufaula v. McNab*, 67 Ala. 589; 1 Dillon on Mun. Corp. (3d Ed.), § 89; *Logan v. Pyne*, 22 Amer. Rep. 261, *supra*.

The only remaining source from which it is, or can be claimed, that this exclusive right can be derived, is from the general law of the State having reference to the incorporation of street railway companies. The appellee corporation, the Birmingham Street Railway Company, was organized under this law, as found embraced in sections 1917 to 1929 of the present Code (1876.) It can have no other rights, therefore, than such as are conferred by, or authorized to be contracted for, under this statute. The section relied on by the appellee's counsel is section 1921 of the Code, which reads as follows:

“Such corporation shall have power to construct, maintain and use a street railroad, upon the streets, and upon the line, and between the *termini* named in the certificate, upon such terms, and in such manner as may be authorized by an ordinance, or other lawful act of the proper corporate authorities of the city or town in which it is proposed to build and use the street railroad. And such railroad company may contract with the city or town therefor, and the contract may be altered when both parties agree to the change.”—Code of 1876, § 1921.

The city of Birmingham, as we have shown, has no distinct power in its charter, express or implied, to grant this exclusive franchise. Is there anything in this section of the Code to authorize it? Conceding that the city is invested with authority to contract with the company for the construction



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and running of a street railway, as a necessary correlative of the company's power to contract with the city; does this, by necessary implication, confer the power to contract for a monopoly of privilege, and one in perpetuity? We are forced to the conviction that it does not. The inquiry, in fact, is answered by one clearly settled principle of law, which is now thoroughly imbedded in our American jurisprudence, and is deemed to be of vast importance in the economy of our system of free government, especially in view of what may now be considered as the baleful result of the celebrated Dartmouth College Case, in the perpetuity of special privileges conferred by franchises from governments. This principle is, that the charters of corporations are to be strictly construed against the corporators, and that no franchise which is granted by the State is ever construed to be exclusive, whether it be in the nature of a contract or not, unless it be so declared in clear terms, or be necessarily implied; or, as expressed by a learned author, "unless the element of exclusiveness appears in the grant itself;" and by another, unless the "terms of the grant render such construction imperative."—1 High on Injunc. (2d Ed.), § 902; Cooley's Const. Lim. (5th Ed.) 493 (\*396). There has been no departure in this country from this doctrine since the decision of the *Charles River Bridge Case* by the United States Supreme Court, as far back as the year 1837. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. It was there said by Chief-Justice TANEY, that "in charters of this description, no rights are taken away from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey." Upon precisely the same principle it has been held, and must logically follow, that no municipal corporation, which is but the creature of the State, can make a grant of exclusive rights, whether by ordinance in the nature of a contract, or otherwise, unless the power to do so is expressly granted by the law-making power, or unless it be so far necessary to the proper execution of other powers expressly granted as to make its existence free from doubt.—*The State v. The Cincinnati Gas Light Co.*, 18 Ohio St. 262. As said by Mr. Dillon, "such a corporation has not an exclusive power over the subject, unless, by express words, or necessary inference, it be plainly given to it by the legislature."—1 Dillon on Mun. Corp. (3d Ed.) § 114. Judge Cooley adopts the view, that a municipal corporation can not, "without explicit legislative consent," permit the construction of a street railway in its streets, and confer on the projectors "privileges exclusive in their character, and designed to be perpetual in duration."—Cooley's Const. Lim. (5th Ed.) 252 (\*207). No reason is perceived why this principle is not

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entirely sound, and in strict conformity to every rule pertaining to the true functions of municipal corporations. Whatever power they may have over the public streets within their limits, is in the nature of a trust. This they can exercise only for the benefit of the public, and not of particular individuals or corporations. They have no implied power to barter away to-day, as a monopoly to one, that which the public necessities of a growing city may require to be reserved, in order that it may be exercised for the public benefit on to-morrow. And such seems to be the sounder and better doctrine, although some adjudged cases may be found which seem to sustain a different view.—2 Dillon, *Munic. Corp.* (3d Ed.) §§ 715–716.

We nowhere find where the city authorities of Birmingham had any power to invest the appellee corporation with the exclusive right which is here claimed.

We might stop here with this case, without extending this opinion further. But the principle involved is of such great public importance as to justify, if not require, a consideration of the constitutional objection which is urged to the existence of this right. The argument is further made, that the General Assembly is prohibited by the organic law from making such an irrevocable grant, and, therefore, under no circumstances, can it be done by a municipal corporation, which is the mere agency of the State, exercising only derivative powers. The power of the agent, it is said, can not exceed that of the principal.

Article I, section 23 of the present constitution of Alabama, provides, that no law shall be passed by the General Assembly “making any *irrevocable grants of special privileges or immunities.*”

Section 2, of article 14, reads as follows: “All existing *charters*, or grants of *special or exclusive privileges*, under which a *bona fide* organization shall not have taken place, and business been commenced in good faith, at the time of the ratification of this constitution, shall thereafter have no validity.”

These provisions occur for the first time in the constitution of 1875, and have not before been the subject of construction by this court.

What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used, that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, and are not commonly conferred by legislative grant, and need no special prohibition in the organic law

[Birmingham & Pratt Mines St. R'y Co. v. Birmingham St. R'y Co.] of a free republic. They may now be regarded as relics of governmental folly, rendered odious by royal prerogative in the most extravagant periods of the European monarchies. In the strict sense, a monopoly is an exclusive right granted to one person, or a class of persons, of something which was before of common right. A franchise is a special privilege conferred by the State or government upon individuals, and which does not belong to citizens of the country by common right. It has been a common legislative practice to make grants of this kind, and they have led to much and protracted litigation in all of the American courts. Examples of this kind are found in numerous cases where the exclusive privilege has been conferred on favored individuals, and corporations, to manufacture and sell gas in a city; or to supply the inhabitants with water; or to construct a bridge, or run a ferry across a river, between two given points, free from competition within certain limits; or to construct a canal, turn-pike, or railroad between certain designated *termini*; or to construct and rent a market-house in a city; or to own and control the only premises which can be lawfully used for the slaughter of live-stock within municipal limits; or, in fine, as has been done many times in this and other States, to confer on favored corporations an irrevocable exemption from the common burdens of equal taxation, either by exacting from them an inconsiderable *bonus* in commutation of all future taxation, or else exacting from them no taxes at all. The following cases illustrate monopolies of this kind, so often conferred by legislative franchises: *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water-Works Co. v. Rivers*, *Ib.* 674; *The Binghampton Bridge*, 3 Wall. 51; *City of Chicago v. Rumpff*, 45 Ill. 90; *Slaughter-House Cases*, 16 Wall. 36; *Gale v. Kalamazoo*, 23 Mich. 344; s. c., 9 Amer. Rep. 80; *Atlantic City Water-Works v. Atlantic*, 39 N. J. Eq.; s. c., 10 Amer. & Eng. Corp. Cases, 59; *Norwich Gas-Light Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Mobile R. R. Co. v. Kennerly*, 74 Ala. 566; *Daughdrill v. Alabama Life Ins. Co.*, 31 Ala. 91; *Home of the Friendless v. Rouse*, 8 Wall. 430. The very fact that the legislature could, according to the better view, make irrevocable grants of this nature, was the very reason, no doubt, why the organic law was made so as to prohibit such grants in the future. In the struggling infancy of States and communities, the temptation has been very great to offer them, as a reward to the investment of capital. The injustice and inequality of their operation have only been illustrated in the light of the rapid increase of our population, the steady growth of our wealth, and the wonderful discoveries of modern science. It now more fully becomes manifest that they prove iron bands



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to fetter the growth of public industry, enterprise, and commerce. Free competition in all departments of commercial traffic is justly deemed to be the life of a people's prosperity. The policy of the law, as now declared by our constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies, which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition.—*The Case of Monopolies*, 11 Rep. 84.

The exclusive right of the appellee to the privilege claimed, in our opinion, can not be sustained. The General Assembly would itself have no power under the constitution to make such a grant. *A fortiori*, a mere municipality would have no such power. Nor can we find, upon any proper principle of construction, that it has anywhere been attempted to confer such a power upon the municipal authorities of Birmingham. They had as much right, therefore, in the exercise of their lawful governmental agency, to give their consent to the appellants to construct and maintain a street railway, in the streets and avenues of the city, as they had to grant the same right to the appellee corporation.

These views result in the reversal of the chancellor's decree. He erred in not sustaining the demurrer, and in refusing to dismiss the bill for want of equity. The injunction should have also been dissolved. We will accordingly enter a judgment here ordering the dissolution of the injunction, and will reverse and remand the cause, that the complainants may have an opportunity to amend the bill, if practicable, so as to give it equity. This is without prejudice to appellee's right to apply for a new injunction, provided the bill can be amended, so as, in the chancellor's opinion, to give it equity, without making an entirely new case. We will not say this is impossible.

Reversed and remanded.

## Campbell Printing Press & Man. Co. v. Jones.

*Statutory Detinue by Mortgagee, for Printing Press.*

1. *Interest on promissory note.*—A promissory note, payable at a future day, "with interest" at a specified rate, bears interest from date, since it would, without these words, bear interest from maturity.

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APPEAL from the Circuit Court of Fayette.

Tried before the Hon. S. H. SPROTT.

This action was brought by the appellant, a private corporation chartered under the laws of New York, against James B. Jones, to recover a printing-press, with damages for its detention; and was commenced on the 4th February, 1886. The plaintiff had sold the printing-press on the 3d June, 1884, to T. C. Olive & Co., at the agreed price of \$1,000, of which \$250 was paid in cash, and for the residue the purchasers executed their six promissory notes, for \$125 each, with a mortgage on the press to secure their payment. The notes were all dated June 3d, 1884, and were payable, respectively, at four, eight, twelve, sixteen, twenty, and twenty-four months after date, at the First National Bank of Columbus, Mississippi, "with interest at the rate of seven per cent. *per annum*." The mortgage was conditioned for the payment of said notes, "as they severally come to maturity; and the only question in the case was, whether the past-due notes had been paid in full, which depended on the question of interest." The plaintiff asked the court to charge the jury, "that in ascertaining the amount due on the mortgage, they should calculate interest on the notes from the date of the execution, and not from the date of their maturity." The court refused this charge, and the plaintiff excepted; and its refusal is now assigned as error.

McGUIRE &amp; COLLIER, for appellant.

NE SMITH & SANFORD, *contra*.

CLOPTON, J.—This is an action of detinue, brought by appellant to recover a printing-press, which the plaintiff sold, in 1884, to T. C. Olive & Co. The plaintiff derives title under a mortgage executed by the vendees to secure the payment of five notes, given for a part of the purchase-money. The defendant put in issue, under the statute, the amount due on the mortgage. For the purpose of showing the amount due, the plaintiff introduced in evidence three of the notes, all of which are dated at Fayette, Ala., June 3, 1884, and payable respectively at eight, sixteen, and twenty months after date; and each promising to pay, to the order of the plaintiff, "one hundred and twenty-five dollars, at First National Bank, Columbus, Miss., value received, with interest at the rate of seven per cent. *per annum*." The principal of the first two notes maturing was paid at maturity. The court instructed the jury to allow interest only from the time of maturity. Whether the notes bear interest from date, or from maturity, is the sole

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question presented for our decision by the submission of counsel.

The principle seems to be settled, that a promissory note payable at a future day, *with interest*, bears interest from date, it being considered as a part of the debt.—*Dorman v. Dibden*, R. & M. 280; *Richards v. Richards*, 2 B. & Ad. 447; *Lerzenberg v. Cleveland*, 19 La. An. 473. If the notes are construed by their own terms, we hold that the plaintiff is entitled to interest from their date. But the intention of the parties is made manifest, when the notes are considered and construed in reference to, and connection with the original agreement, made at Kansas City, in April, 1884. After stating the agreement to sell, and to deliver, boxed on cars at factory, the contract contains this stipulation: "T. C. Olive & Co. hereby agree to buy said press as above specified, and pay therefor, on receipt of bill of lading for same, cash \$250.00, and \$750.00 in notes bearing legal rate of interest, as follows;" and then follows a statement of the notes by amount, and the time when payable. The mortgage and notes were subsequently executed in pursuance and consummation of this agreement. It seems evident that, by the original contract, the notes were to bear interest from the delivery of the press. Otherwise, the words, *bearing legal rate of interest*, would be without meaning and operation. Such is the legal effect after maturity, without express stipulation. In *Kennedy v. Nash*, 1 Starkie, 452, Lord Ellenborough held, "that under the words, *bearing interest*, the plaintiff was entitled to recover interest from the date of the bill, since, without any such words, he would be entitled to interest from the time when the bill became due." The obligation of the note is to pay the principal, with interest. To limit the time when the interest begins to run, to maturity, is to presume that the parties contemplated the notes would not be paid when payable, and therefore provided they should bear interest thereafter. In order to give some effect to all the terms of the notes, our conclusion is, that the interest runs from date.

Reversed and remanded.



[Perdue v. Montgomery Building and Loan Association.]

## Perdue v. Montgomery Building and Loan Association.

*Statutory Action in nature of Ejectment.*

1. *Conveyance to married woman, "for her sole use and benefit."* When lands are conveyed to a married woman, "for her sole use and benefit," her husband's marital rights are excluded, and she takes an equitable estate, which she may convey or charge by mortgage executed jointly with her husband; and the same construction and effect will be given to the words when used in a quit-claim deed.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellee, a private corporation, against Mrs. Sallie L. Perdue and others, to recover two lots in the city of Montgomery; and was commenced on the 17th November, 1885. The defendants, who were the children of David H. Carter and his wife, Mrs. Martha L. Carter, pleaded not guilty; and the cause was tried on issue joined on that plea. The plaintiff claimed title under two mortgages executed to it by said David H. Carter and wife, the first of which was dated the 13th May, 1871; and offered these mortgages in evidence, in connection with proof that the amount due on the mortgages, with interest, was about \$10,000. If was proved, also, that Mrs. Carter was in possession of the lots at the time the mortgages were executed, claiming title under a deed of conveyance executed to her by John P. Figh and wife, which was dated July 7th, 1859, and recited the payment of one dollar as its consideration, using the following words of conveyance: "Do remise, release and forever quit-claim, unto the said Martha L. Carter, the following described lots," &c., "in free and actual possession now being, and to her heirs and assigns forever, all the estate, right, title, interest, use, trust, property, claim and demand whatever, in law as well as in equity, in possession as well as in expectancy, in and to all and singular the said lands, tenements and hereditaments; to have and to hold the said released premises unto the said Martha L. Carter, for her sole use and benefit, her heirs and assigns, to her own proper use, benefit and behoof, forever, so that neither the said John P. Figh and Jane Figh, their heirs or assigns, or any other person or persons in trust for them, or in their name or names, or in the name, stead or right of any

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of them, shall or will, can or may, by any way or means whatever, hereafter have, claim, challenge or demand any right, title, interest or estate in and to the said premises hereby released; but that we, the said John P. Figh and Jane Figh, our heirs and assigns, each and every of them, from all estate, right, title, interest, property, claim or demand whatsoever, in and to the said premises, or any part thereof, are and shall be, by these presents, forever excluded and barred." This being all the evidence, the court charged the jury, that they must find for the plaintiff, if they believed the evidence. The defendants excepted to his charge, and they now assign it as error.

W. L. BRAGG, W. S. THORINGTON, and R. M. WILLIAMSON, for the appellants.—Mrs. Carter was in possession of the property at the time the release was executed by Figh and wife, but the nature of her claim or title does not appear; but, as this was eight years after the passage of the "married woman's law" of 1848, the presumption is that the property was held as her statutory estate.—*Patterson v. Kicker*, 72 Ala. 408. The deed, or release, is inartificially drawn, contains no words of grant or conveyance, and does not create any estate in Mrs. Carter, nor affect the nature or character of whatever estate or interest she already had in the property. The object and purpose of the instrument, as shown by its several clauses and recitals, was to impose restraints and estoppel upon the grantors and their privies; and this is its whole legal operation and effect. The intention to exclude the husband's marital rights is not clearly shown, within the strict rule established by the adjudged cases.—*Pollard v. Merrill*, 15 Ala. 169; *Mitchell v. Gates*, 23 Ala. 438; *Connor v. Williams*, 57 Ala. 133; *Hooks v. Brown*, 62 Ala. 258; *Lamb v. Milnes*, 5 Vesey, 617; 4 Madd. 409; *Johnson v. Johnson*, 32 Ala. 637; *Logan v. Thrift*, 20 Ohio, N. S. 62; *Ashcraft v. Little*, 4 Ired. Eq. 236; *Rudisell v. Watson*, 2 Dev. Eq. 430; *Lamb v. Wragg & Stewart*, 8 Porter, 73; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Inge v. Forrester*, 6 Ala. 418.

SAYRE & GRAVES, *contra*.—The deed from Figh and wife being the only muniment of title shown by Mrs. Carter, her possession must be referred to it. The words used in that instrument clearly exclude the husband's marital rights, and create an equitable estate.—*Cuthbert v. Wolfe*, 19 Ala. 373; *Ozley v. Ikelheimer*, 26 Ala. 332; *Jenkins v. McConico*, 26 Ala. 213; *Miller v. Voss*, 62 Ala. 122. A quit-claim deed is as effective to pass title to land as any other.—Martindale on Conveyancing, § 59. That the *habendum* clause is effectual to create an estate, see *Turner v. Kelly*, 70 Ala. 85.

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STONE, C. J.—It is not controverted by appellants, that the language of the *habendum* clause, in the deed we are called upon to interpret, would, if found in a deed of bargain and sale, vest in Mrs. Carter, the grantee, an equitable separate estate, as distinguished from an estate made separate by our statute. “To have and to hold . . . unto the said Martha L. Carter, for her sole use and benefit,” are clearly words of exclusion, under all our rulings. The decisions of this court, bearing on the question, are to some extent collected and classified in *Miller v. Voss*, 62 Ala. 122; 2 Brick. Dig. 81.

The precise form of appellant’s argument is, that the principle stated can not apply to this case; first, because the conveyance is only a quit-claim deed, and does not purport to convey title. This is a misapprehension of the effect of the quit-claim deed. The present conveyance contains the words “remise, release, and quit-claim.” These words import much more than a mere disclaimer of interest. They imply that there is an interest, or claim, which is surrendered. They are sufficient to pass the estate in a primary conveyance. See the words *Remise* and *Quit-claim*, in Bouvier’s Law Dictionary. Such deed avails to transfer whatever title the grantor, or maker of the deed, has. It may even convert a tortious possession into a lawful seizin, and, in such case, would be the holder’s only muniment of title.—2 Bla. Com. \*518–9.

A second position taken for appellant is, that the words of exclusion found in the quit-claim deed were inserted, not for the purpose of excluding the marital rights of Mrs. Carter’s husband, but for the purpose of barring effectually all claim Mr. Figh, the maker of the deed, or his heirs, might assert. This would render them wholly nugatory; for the words “remise, release, and quit-claim,” accomplished that. The entire *habendum* clause bearing on this question is in the following language: “To have and to hold the said released premises unto the said Martha L. Carter, for her sole use and benefit, her heirs and assigns, to her own proper use, benefit and behoof forever, so that neither the said John P. Figh and Jane Figh, their heirs or assigns, or any other person, . . . shall, will, can or may, by any ways or means whatever, hereafter have, claim, challenge or demand any right, title, interest or estate, in and to the premises above described and hereby released.” The argument is, that the context shows the intention was to exclude all claim of Figh and his heirs, and not the marital rights of Mrs. Carter’s husband. A more rational interpretation is, that the words, “unto the said Martha L. Carter, for her sole use and benefit, heirs and assigns,” were intended to express the *quantum* of interest she would take, and the right in which she would take it, and that the residue of the clause was in-



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serted—unnecessarily inserted, perhaps—to bar effectually any claim Figh, his heirs or assigns, might assert. Manifestly, the deed is needlessly verbose, and the work of an unskilled draughtsman.

This quit-claim deed was introduced in evidence by the defendants, and the bill of exceptions affirms that “it was admitted [it] constituted the title under which Mrs. Martha L. Carter claimed and owned the property at the time the two mortgages were executed.” It created in her an equitable separate estate, which she had power to charge and did charge by the execution of the mortgages.

The judgment of the Circuit Court is affirmed.

CLOPTON, J., not sitting.

## Winter v. City Council of Montgomery.

### *Bill in Equity to enforce Payment of Municipal Taxes out of Property of Married Woman.*

1. *Waiver of demurrer and objections to amendable defects, by agreement for consent decree of compromise.*—A written agreement in a chancery cause, made and entered of record after demurrer filed, by which it is stipulated that the controversy should be compromised on certain specified terms, and should be submitted to the chancellor for decision “on the basis of this agreement,” is a waiver of the demurrer, so far as consent can waive objections to the equity of the bill, and of all amendable defects in it; but the decree must conform to the terms of the agreement.

2. *Legal and equitable remedies for collection of taxes.*—Taxes levied and assessed create a legal liability, which will support an action at law, although a statutory remedy is also given to enforce their payment; and where the legal remedy is inadequate, as where the owner of the property is a married woman, and the taxes have remained unpaid for a series of years, the lien on the property may be enforced in equity.

3. *Subscription to railroad by municipal corporation; levy of tax to pay interest on bonds.*—The power being granted to the corporate authorities of the city of Montgomery, by special statute, “to levy such taxes as may be necessary, upon the real and personal property in said city,” to pay the interest on the city’s subscription to the capital stock of the South and North Alabama Railroad Company, a levy on real property only was not void, the failure to include personal property also being a mere irregularity; and the action of the authorities being in its nature legislative and governmental, rather than corporate, the *onus* is on a party assailing it to show that a different rate of taxation was necessary.

4. *Opinion of witness; when admissible.*—As to the amount and value of the personal property in a city at a particular past time, or

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during specified years, the opinions of witnesses can not be received, when they do not appear to be founded on knowledge of the facts.

5. *Documents used before register; presumption in favor of chancellor's decision.*—When affidavits, or other documents, used before the register on a reference, are not set out in the record, this court can not make any presumption as to their contents, against the rulings of the register and the chancellor.

6. *Arbitration of pending suit; construction and effect of unexecuted agreement.*—An agreement to submit a controversy to arbitration, not consummated, does not oust the jurisdiction of the courts, at the instance of either party; and where the matters in controversy in a pending suit are submitted for decree “on the basis of an agreement” between the parties, by which it is stipulated that, as to a part of the amount claimed by plaintiff, which was to be submitted to arbitration, “no collection shall be made until the decision of said arbitrators, provided such decision is made by” a certain day, this does not prevent the reduction of the demand to judgment by the decree of the court.

7. *Consent decree against married woman.*—In the absence of fraud in its procurement, or other special cause shown, a consent decree is as binding on a married woman as on a person *sui juris*.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 22d February, 1882, by the City Council of Montgomery, a municipal corporation, against Joseph S. Winter and his wife, Mrs. Mary E. Winter; and sought to subject certain real estate in the city of Montgomery, which was alleged to be held by Mrs. Winter “as her separate estate,” to the payment of municipal taxes assessed against it from the year 1873 to 1881, inclusive. The transcript filed in this court has never come to the hands of the reporter, and he has used the original papers on file in the office of the register in chancery. A demurrer to the bill was filed by Mrs. Winter, assigning twenty-four causes or grounds of demurrer; among which were, that the bill showed no case of equitable jurisdiction, and that the statutory lien was lost and barred. Afterwards, a written agreement was entered into, as follows:

“Whereas a suit is now pending in the Chancery Court at Montgomery, wherein the City Council of Montgomery is complainant, and Mary E. Winter is defendant, involving a controversy in relation to city taxes for several years past: Now, for the purpose of compromising and settling said controversy, and the claims and demands of the complainant against the respondents and the property concerned in said suit, this agreement, made and entered into this 18th day of October, 1882, by and between the City Council of Montgomery of the one part, and Joseph S. Winter and Mary E. Winter of the other part, *witnesseth*:

“1. The City Council of Montgomery is to remit all taxes levied to pay the certificates of indebtedness issued by the City

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Council, since and including the year 1873. The following taxes to be paid by the defendant in the said tax suit, and such amount of the railroad tax as may be found to be proper, for the years 1873, '74, '75 and '76, upon ascertaining what rate of taxation upon the real and personal property respectively of the city was necessary to pay the interest on the railroad bonds during said years, estimating \$45,000 for each of said years as necessary for said purpose. (B.) All taxes levied to pay the current expenses, and the bonds issued in adjustment of the indebtedness of the city under the act of December 16th, 1876, from 1873 to 1881, inclusive. (C.) No interest to be charged on any of the taxes. (D.) The select committee heretofore appointed by the City Council, to reduce the assessed value of any of the property, upon showing made that there has been an over-valuation made; but this matter to be left to the decision of the committee alone.

"2. The said Mary E. Winter to have one, two, and three years, in which to pay the amount found due, from July 5th, 1882; and no interest to be charged thereon until the 5th July, 1883, and one-third of the amount payable each year.

"In the event it is decided by the Supreme Court, in the case of the *State, ex rel. &c. v. City Council of Montgomery et al.*, that the levy of the taxes concerned in the said suit, made by the City Council of Montgomery aforesaid, to pay interest on the bonds issued in aid of the South and North Alabama Railroad Company, is invalid, then the amount of all railroad taxes included in the claim of the city aforesaid, and concerned in said chancery proceedings, is to be stricken from the amount claimed by said city.

"4. If it be decided by arbitrators, one to be chosen by each of the parties hereto, and they to call in an umpire if they disagree, that the sale by the city of the property for the taxes of 1873 extinguished the demand of the city for such taxes, then the amount thereof is to be stricken out of the amount of the taxes claimed by the City Council; provided said arbitration is had within thirty (30) days from this date; and if such arbitration is not had within thirty (30) days from this date, then the question is to be submitted to the Chancellor for decision in vacation.

"5. The said case of the *City Council of Montgomery v. Mary E. Winter* is to be submitted to the Chancellor in vacation, and a decree rendered upon the basis of this agreement. The submission is to be made after the expiration of thirty (30) days from this date; provided the arbitrators herein provided for do not render a decision within thirty days.

"6. No taxes to be paid on any property which did not belong to the defendant in the chancery suit at the time the taxes were assessable.



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"In case no decision is made by the Supreme Court in the case of the *State, ex rel. &c. v. City Council of Montgomery*, by July 5th, 1883, then the first payment provided for by this agreement, when made, shall be applied, *pro tanto*, to the payment of the said city taxes other than the taxes in aid of the South and North Alabama Railroad Company; and the question of the validity of the taxes included herein on account of said railroad company shall be submitted, on demand of either party, to mutually agreed on third parties, learned in the law and disinterested, with power in them to appoint an umpire, if necessary to settle any difference of opinion between them; and no collection of said railroad taxes shall be made until the decision of said arbitrators, provided such decision is made by July 15th, 1884."

Under this agreement, a decree was rendered on the 3d April, 1883, as follows: "This cause is submitted on the pleadings and agreement of parties, for consent decree; and upon consideration, it is ordered, adjudged and decreed, that complainant has a lien upon the real estate described in the bill which belonged to defendant, Mary E. Winter, for the payment of the taxes due by defendant to the city of Montgomery, for the years 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, and 1881. It is further ordered, adjudged and decreed, that it be referred to the register of this court to ascertain—(1.) The rate of taxation upon the real and personal property in the city of Montgomery which was necessary to pay the interest on the bonds issued in aid of the South and North Alabama Railroad Company during the years 1873, 1874, 1875, and 1876, estimating \$45,000 during each of said years as necessary for that purpose. (2.) The assessed value for taxation of the property in the city of Montgomery belonging to the said Mary E. Winter during each of the years 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, and 1881. In ascertaining this assessed value, the register will be governed by the determination of the select committee of the City Council of Montgomery, as to the valuation of the property on which such committee reduced the assessed value. (3.) The amount of taxes due by the said Mary E. Winter to the city of Montgomery for the years 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, and 1881; ascertaining and reporting the amount of each year separately, and ascertaining and reporting separately the amount of taxes to pay the interest on the railroad bonds, and the amount of taxes to pay the current expenses of the city and the bonds issued in adjustment of the indebtedness of the city under the act of December 16th, 1876. The register will not ascertain the amount of taxes upon any property for any of said years which did not belong to the defendant during such year, at the commencement of the tax-

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year; and in ascertaining the amount of taxes to be paid by the defendant, the register will be governed by the agreement of parties this day filed. The register will report as early as practicable."

The register made his report, under this reference, to the ensuing October term, 1883, and the cause seems to have been then submitted for decree, as shown by the recitals of a decree rendered in vacation, in August, 1884, as follows:

"This cause was submitted at the Spring term, 1884, 'on the report of the register, for final decree,' and held for consideration in vacation. At the Fall term, 1883, it had been submitted 'by agreement on file, to be considered in vacation;' but the file had not been delivered to the Chancellor before the Spring term, 1884, and no action had been taken. When the papers were sent to the Chancellor in August, 1884, there were two notes of testimony on file; one filed Oct. 20, 1883, and the other on July 3d, 1884, as note of testimony No. 2. On July 7th, 1884, the defendant also filed six exceptions to the register's report. In the second note of testimony, complainant objects to the introduction of the evidence numbered 7, and also to the affidavits named in item 8; and thereupon it is ordered, that the same be, and it is hereby sustained. There seem to have been exceptions to the ruling of the register on the admissibility of testimony at the reference; but, as they are not alluded to in the exceptions, nor in the notes of testimony, they need not be noticed.

"1. The agreement and the decree of reference is, that the defendant is chargeable with 'such an amount of the railroad tax for 1873-4-5-6 as may be found to be proper, upon ascertaining what rate of taxation upon real and personal property respectively was necessary to pay interest on the railroad bonds.' The register finds, in his report, that no tax on personal property was levied in 1873 for this purpose; and that, therefore, the tax for that year, for this purpose, fell exclusively on real estate. It does not seem that this finding is opposed to the agreement, or to the order of reference; and thereupon it is ordered, that the first exception be overruled.

"2. It seems to the court that there was sufficient testimony before the register to support his finding, that the several parcels of land were the property of the defendant, Mary E. Winter, in 1873, and continued to be in such condition that a lien attached to them as her property, in the succeeding years; and thereupon it is ordered, that the second exception to the report be overruled.

"3. If lands are sold for taxes, and a deed made to the city, they can not be redeemed, except upon the payment of taxes, not only for the year for which they were sold, but also for the

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succeeding years; and so, if both parties choose to regard the sale as void, a lien attaches to the land for the payment of the taxes, from the first year to its enforcement. It is thereupon ordered, that the third exception to the report be overruled.

"4. There does not appear anywhere an agreement or consent to submit to arbitration. In the fourth paragraph of the agreement it is provided what shall be done, *if* certain things shall be decided by arbitration; but this can not be construed into an obligation to submit to arbitration. It is thereupon ordered, that the fourth exception to the report be overruled.

"5-6. These exceptions are too general, and, for this reason, are not maintainable; and thereupon it is ordered, that the 5th and 6th exceptions to the report are hereby overruled; and it is ordered, adjudged and decreed, that the register's report be in all things confirmed.

"And it appearing from said report, and from the testimony, that the sum of \$4,440.50 is due to complainant for taxes for said years from defendant upon the lands described in the pleadings, one-third of which is due by agreement on the 5th July, 1883, one-third on the 5th July, 1884, and one-third on the 5th July, 1885, without interest; it is thereupon ordered, adjudged and decreed, that complainant has a lien upon the real estate described in the pleadings, for the payment of the taxes as aforesaid on the same; and that, unless the defendant pay to the register, within twenty days after the filing of this decree, all the costs of this cause, and two-thirds of said sum of \$4,440.50 to complainant, the register of this court will proceed to advertise and sell the lands described in the pleadings, in accordance with the rules and regulations governing the sale of real property under executions at law, and, out of the proceeds of such sale, will retain and pay the costs and expenses of said sale and of this suit, and then two-thirds of said sum of \$4,440.50, to-wit, \$2,960.33, to complainant, if sufficient thereunto; and if not sufficient, then so far forth as the same will extend. But, if less than the whole of said real estate will be sufficient to pay said costs, expenses, and taxes aforesaid, then the register will sell such portion only of said lands as will be sufficient; first selling those portions which may be selected to be sold, if any, by defendants. But, if said costs and expenses are paid, and said sum of \$2,960.33, before a sale of said lands, then no further sale will be made until after July 5th, 1885, when the register will advertise and sell, as above directed, the whole, or any portion of said lands then remaining unsold, unless the costs and expenses are first paid to the register, and the remaining one-third of said sum of \$4,440.50, to-wit, \$1,480.17, are paid to the complainant; and the register will apply the proceeds to the payment of such costs and expenses



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as are unpaid, and to the payment of said sum of \$1,480.17 to the complainant; and if a balance shall remain in his hands of such proceeds, he will pay the same to the defendant, Mary E. Winter. The register will make a deed to the purchaser, and put him in possession of the premises, upon his complying with the terms of the sale. Complainant may bid at such sales."

The appeal was sued out on the 1st March, 1885, from this last decree, and each part of it seems to have been assigned as error.

THOS. H. WATTS, and J. S. WINTER, for appellant.

GUNTER & BLAKEY, *Contra*.

SOMERVILLE, J.—The bill is filed by the City Council of Montgomery, as a municipal corporation, to enforce the payment of back taxes, due for nine consecutive years, and assessed against the real property belonging to a married woman. A demurrer was filed, in which many causes were assigned, and among others the objection, that the complainant's remedy was at law, and not in a court of equity, which had no jurisdiction, as was urged, to enforce a tax lien. This demurrer was not, however, insisted on, nor ruled on by the court, but was waived by a mutual agreement of the parties litigant, by which it was stipulated that the pending controversy should be compromised upon certain specified terms, and should be submitted to the chancellor for the rendition of a decree by him, "upon the basis of this agreement." It is quite obvious that the effect of this agreement, bearing date October 18th, 1882, was to abandon the demurrer, and all objections raised by it, so far as this could be accomplished by consent. The argument is made, however, that notwithstanding this agreement, the Chancery Court has no jurisdiction of the subject-matter in controversy, and that consent of parties can not confer such jurisdiction. Let us examine the nature of this suit, with the view of testing the correctness of the application of this principle.

The subject-matter of the suit, as we have said, is the enforcement of a lien, given by statute, against the separate estate of a married woman, for taxes assessed according to law. In *Perry County v. Railroad Company*, 58 Ala. 546, it was said that, according to a preponderance of the authorities, taxes levied and assessed become a legal liability on the tax-payer, and may be enforced by an action at common law, unless the statute gives a remedy which is intended to be exclusive. It was not necessary, however, to go further in that case than to hold, that a levy and an assessment of taxes create a legal liability on the tax-payer to pay. Desty, in his treatise on Taxa-

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tion, says: "The preponderance of authorities establishes, that either debt or assumpsit may be sustained for the recovery of taxes, as debt lies for a sum of money certain due by statute." 2 Desty Tax. § 126. In *U. S. v. Lyman*, 1 Mason, 482, it was ruled by Judge Story, that debt would lie to recover duties upon imported goods; and this ruling was followed in *Meredith v. U. S.*, 13 Peters, 486. In accordance with this view, it was again decided in *Savings Bank v. U. S.*, 19 Wall. 227, that debt will lie for taxes in the name of the Government, or State. There are many other well-considered cases which support this principle, upon the theory, that an undertaking or obligation to pay is created by law, being implied from the existing duty, just as, in this and many other States, debt is commonly brought for a mere penalty created by statute.—*Strange v. Powell*, 15 Ala. 452; *Perry County v. Railroad Company*, *supra*; *City of Dubuque v. The Illinois Cen. R. R. Co.*, 39 Iowa, 56; *Cason v. Newsom*, 8 Heisk. (Tenn.) 446; *City of Memphis v. Looney*, 9 Baxt. (Tenn.) 130; *U. S. v. Pacific R. R. Co.*, 4 Dillou, 66; Greenl. Ev. (14th Ed.) §§ 270, 288; Bishop on Contr. §§ 5, 72; 2 Desty on Tax. § 126. We adopt this principle, as the sounder and better one, although there are many respectable authorities to the contrary. If no action at law would lie for taxes, much inconvenience and injustice would result. A tax-payer might often escape the payment of his just proportion of the public burdens, imposed for the support of government, by the wrongful act of a tax-collector in extending the payment of his taxes, either from gross negligence, or a weak spirit of accommodation.

It can not be doubted, that there may be circumstances under which a court of equity would take jurisdiction of the enforcement of a tax-lien; although the rule may be, that it will decline to do so without the existence of some ground of equitable cognizance, other than the mere fact that there is a lien. In *State v. Duncan*, 3 Lea (Tenn.), 679, a bill of this character was sustained, the question of equitable jurisdiction to enforce such liens being one especially under consideration. The argument there was the same as that urged here—that the lien being one created by statute, and the mode of its enforcement being expressly given, all other modes were excluded by necessary implication. The lands had been sold for ten years' successive taxes, and purchased by the complainant, the sales being void for irregularity in the proceedings. It was held, that the statutory remedy was not adequate in a case of complication and embarrassment like the one in hand, where the purpose was to collect back taxes; and the bill was accordingly sustained, as was also a similar one in *Edgefield v. Brien*, 3 Tenn. Ch. Rep. 673. The courts of Tennessee, we may add, have always

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adopted the view that taxes were a debt, for which an action at law would lie.

The remedy of the complainant in the present case is shown to be attended with many embarrassments. The lien for taxes is created by law, and is a legal right which exists independently of the remedy for its enforcement. This remedy given by statute is gone with the lapse of years, because of the failure of the proper officer to enforce it at the authorized time. The owner of the property is a married woman, against whom a personal judgment will not lie, and who is not suable in an action of ordinary debt at law, because of her coverture. This fact is often, of itself, a ground of equitable cognizance. 1 Pomeroy's Eq. Jur., § 160; *Fariss v. Houston*, 78 Ala. 250. We might safely assert, that the allegations of the complainant's bill, setting out the foregoing facts, show a proper case for the jurisdiction of a court of chancery. But this we need not now decide. It is unimportant that the averments of the bill were defective, or wanting in fullness, and, therefore, that it was for many reasons demurrable, or that the bill itself was wanting in equity, because the complainant had a complete and adequate remedy at law. These defects, if they existed, were capable of being cured by amendment; and the consent of the defendants, that a decree should be rendered by the chancellor, was tantamount to an agreement that all amendable defects should be supplied by intendment. These we will accordingly regard as having been made. *Consensus tollit errorem*. What we decide is, that, in this case, the Chancery Court was not without jurisdiction to render a decree condemning the property of the defendant, Mrs. Winter, to the payment of such taxes as were due by her to the City Council of Montgomery, under the allegations of complainant's bill. *Abraham v. Hall*, 59 Ala. 386; *Westmoreland v. Foster*, 60 Ala. 448; *State v. Duncan*, 3 Lea, 679, *supra*.

The only decree which the chancellor was authorized to render, however, was one based on the written agreement of the parties. If we can clearly see from the evidence that his decree conflicts with the stipulations of this agreement, it is our duty to declare it to be so far erroneous. It is an important feature of this agreement, that it recognizes a *prima facie* liability on the part of the defendant to pay all taxes levied to pay the current expenses of the city, as well as those levied under the act of December 16th, 1876, from the year 1873 to the year 1881, inclusive. From this amount there is an express agreement that certain deductions may be made, some absolutely, and others on conditions specified.

It is insisted on the part of the appellants, that they should have been permitted to enter into a collateral investigation of



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the amount and valuation of the personal property located in the city of Montgomery, during the year 1873, with the view of showing what rate of taxation was necessary to be levied in order to pay the interest on the railroad bonds for that year. The grant of power to the city council being "to levy such tax as may be necessary upon the real and personal property in said city," it may be that both kinds of property should have been equally subjected to taxation. In *Winter v. The City Council of Montgomery*, 65 Ala. 404, we held, that a levy upon real property only was not void, and that the omission to tax personal property was at most only an irregularity, for the correction of which an injured tax-payer would have an adequate remedy by *mandamus*. Conceding the construction contended for to be correct, the *onus* was on the defendants to show, by proper evidence, that another and different rate of taxation than that adopted by the city council was necessary; their action being in its nature legislative and governmental rather than merely corporate, as was held by this court in the case last cited. The testimony offered by the defendants, to show the amount and valuation of all the personal property in the city of Montgomery in the year 1873, was incompetent, and properly rejected. The witnesses who were introduced, failed to show that they possessed any knowledge of the fact. Their opinion, in the absence of such knowledge, was mere speculation. The first exception to the report of the register raises only this one point, and was properly overruled.

As it was provided by item 6 of the agreement, that "no taxes were to be paid on any property which did not belong to the defendants" at the time the taxes were assessed, it was competent for them to show that the ownership of any of the property so assessed was in another person at the time of such assessment. It appears that this was attempted to be done by the introduction of certain deeds and affidavits, referred to in the register's note of testimony. As these papers are nowhere set out in the record, we can not know their purport or contents, and must presume the finding of the register and of the chancellor to be correct.—*Toon v. Finley*, 74 Ala. 343.

For a like reason, we decline to disturb the finding of the chancellor on the question whether the sale by the city of certain property for the taxes of 1873 extinguished the demand of the city for such taxes. There appears to have been an agreement of counsel as to the facts attending the sale of this property, which was in evidence before the register; but it has been omitted from the record, without any evidence of its contents. *Non constat* but that it sustained the conclusion reached in the decree, and so the law presumes. The obvious condition, upon which it was impliedly agreed that this matter should be sub-

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mitted to arbitration, was that the arbitration, if had at all, should be completed within thirty days from date, which was never done.

It is further contended that, under the terms of the agreement of October 18th, 1882, the Chancery Court was excluded from considering the question of the validity of the city's claim of taxes levied to pay interest on certain bonds issued in aid of the South and North Alabama railroad; that this matter of controversy was agreed to be submitted to arbitration, and the jurisdiction of the courts was thereby ousted. We do not construe the agreement to have this effect. It has been held by this court, that a mere agreement to arbitrate a controversy "can not be enforced at law or in equity, because no one can effectually waive his right to have his suits determined in the proper courts provided by the laws of his country."—*Bozeman v. Gilbert*, 1 Ala. 90; *Stone v. Dennis*, 3 Port. 231. However this may be, the authority of arbitrators, under a submission at common law, could always be revoked by either party before the making of the award, and a mere agreement to arbitrate is not considered a defense to an action.—2 Greenl. Ev., §§ 79, 69. How far, if at all, these principles may be affected by our present Code of laws governing statutory arbitrations, is not a question before us.—Code, 1876, § 3536. Our proposition is, that it was never contemplated by the agreement of the parties that the chancellor should not consider the question of the validity of the railroad tax. The agreement itself, upon the basis of which the decree was rendered, recognizes a *prima facie* liability for all taxes levied by the city to pay the bonds on which this interest was due. It was agreed that the cause should be submitted for decree within thirty days from October 18th, 1882, and that the defendants should have one, two and three years, in which to pay "the amount found due." Inasmuch, however, as a case was then pending in this court involving the legal validity of this tax, it was agreed that, in the event that the decision was adverse to the tax, "it should be stricken from the amount claimed by said city." If no decision was made by the fifteenth of July, 1883, the question was to be submitted to arbitration, on demand of either party, "and," it was added, "*no collection of said railroad taxes shall be made*, until the decision of said arbitrators, provided such decision is made by July 15th, 1884." This provision operated only as an agreement to stay the *collection* of the tax for the time, and under the conditions stipulated, and not to waive the plaintiff's right to have it reduced to judgment by the court to which the whole controversy had been submitted by the terms of the agreement. If its invalidity had been pronounced, in the manner agreed on, the amount of the tax could have

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been deducted from the decree of the court. And such we believe was the intention of the parties.

There is, in our opinion, no force in the suggestion, that the agreement authorized only a personal decree against the defendants, and not a condemnation of the property. The law made the taxes properly assessed a lien on the property, and there is no clause in the agreement which can be construed to waive the right. The decree did not create the lien. It only seeks to furnish a remedy for its enforcement. The declaration of the statute, as found in section 15 of the city charter, to the effect that the assessment "shall have the force and effect of a judgment and execution, and may be collected by levy and sale of the property," on giving proper notice, does not impair this lien in any respect.—Acts 1869–70, p. 366. It only furnishes warrant of law for the seizure and sale of the property, as in cases of execution sale on process issued from the Circuit Courts of the State.

We find no error in the chancellor's decree, and it must be affirmed.

CLOPTON, J., not sitting.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application for rehearing, the following opinion was delivered :

STONE, C. J.—The preservation of life, liberty, property—of public peace, good order, good morals and public health, are everywhere acknowledged to be powers and functions of civil government, whose exercise is necessary to the very existence of social order. Municipal government can not exist, in any form, without human instrumentalities, for the support of which a revenue is indispensable. Hence it is, that revenue is the life-blood of the municipality, without which it must perish. Hence it is, that government can not barter away its power to levy and collect taxes. The payment of taxes is, in part, the price every citizen pays for the protection of himself and his property, which the government extends alike to all. The government owes to its citizens of every class the same measure of protection, and it makes itself wickedly derelict, if it fails to discharge this sacred obligation. Is there not an obligation equally binding on the citizen, to contribute his proportion of the revenue—the life-blood—so necessary to the existence of the municipality? Can human ingenuity conceive of a mere civil obligation that is higher, or more binding, than this? So important did the legislature esteem the duty of paying taxes, that they declared a lien on the property assessed for their pay-



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ment; and this lien follows the property, into whose hands soever it may be transferred. Quoting from *Burroughs on Taxation*, we, in *Perry County v. Railroad Company*, 58 Ala. 546, 564, said: "Taxes are a political necessity. If the law raises a promise to pay, that one of its citizens may not obtain the services or goods of another without compensation, surely it will raise it that the State may exist. The tax is a personal charge against the citizen, notwithstanding a lien upon the property may be given by statute for its payment."

There are authorities which hold, that when the statute provides a remedy for the enforcement of taxes, such remedy is in its nature exclusive, and precludes all other modes of redress. We submit if this is a just presentation of the question. The liability to pay taxes imposes both a legal and moral duty, which can and should in no sense be assimilated to a statutory penalty. It is, in this case, and generally is, more than a mere legal and moral obligation. There is a lien on the property for its payment; a lien which adheres to it, no matter who may own the title; a lien which a *bona fide* purchase will not override. Pure *allodium*—"absolute ownership of property, without recognizing any superior to whom any duty is due on account thereof"—does not exist under our system. Liability to taxation, and to the assertion of the right of eminent domain, rests on all estates as a servitude or infirmity. And can it be, that the mere failure of an officer to do his duty sternly, whether caused by accident, carelessness, ignorance of the proper remedy, inattention or undue indulgence, is a forfeiture of this right,—a right pertaining, not to the delinquent officer, but to the municipality? In *Perry County v. Railroad Company*, *supra*, we said: "Levy and assessment of taxes create a legal liability on the tax-payer to pay." We adhere to that doctrine, with all its implies.

Married women can not be sued at law, on personal contracts, or legal liabilities. They can only be reached by proceeding in equity against their property, and holding it accountable. They must be made parties, but no personal decree can be rendered against them.

It is contended that, under the averments of the bill in this case, we must treat Mrs. Winter's separate estate as statutory; and inasmuch as the law does not empower her to incur a binding money obligation, she can not be proceeded against, upon an implied promise to pay. From these premises, the conclusion is claimed, that no liability for taxes can be fastened on her property. We concede the premises—concede that, as her estate is made to appear in the present suit, she can make no binding personal contract to pay money. Does the alleged conclusion follow?

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Under no circumstances, save those mentioned in the statute, can a woman, pending her coverture, make any disposition of her statutory estate, or fasten a liability, charge, or incumbrance upon it. But there are many categories in which such estate may be made subject to judicial determination. An unmarried female has undoubted capacity to make binding personal contracts, and is subject to the same methods for their enforcement, as the opposite sex is. Her subsequent marriage, leaving such liability unliquidated, changes the tenure by which she holds her property into statutory separate estate. Yet it does not relieve it from the payment of her debts contracted before coverture. So, she may be a trustee, made so by appointment, or may acquire property which is charged with a trust. A purchase of real property in her name, the purchase-money remaining unpaid, in whole or in part, is a familiar illustration. In such case, equity deems that she holds the land in trust for the payment of the purchase-money, and orders the land to be sold, unless the liability is otherwise removed. The true principle is, not that the married woman's property is placed beyond the reach of the law, but that, pending the coverture, she can make no contract which charges her statutory estate with the payment of money. *Strong v. Waddell*, 56 Ala. 471; *Marks v. Cowles*, 53 Ala. 499; *Lee v. Sims*, 65 Ala. 248.

It is further contended that the consent decree found in this record is not binding on Mrs. Winter, by reason of her incapacity to give such consent. My own opinion is, that the decree is right, without the aid of her consent. But, in the absence of some special reason, such as fraud in its procurement, a consent decree is as binding on a married woman as on a *feme sole*.—*Lee v. Sims*, 65 Ala. 248, 254.

We have, then, this case: Taxes have been assessed against the real estate of a married woman, which raises a moral obligation and legal liability for their payment; that obligation is emphasized by the legislative declaration that a lien exists on the property assessed for its discharge; a married woman owns the property, and no personal suit can be maintained against her. If a bill to subject the property can not be maintained, the city is without a remedy to coerce the payment of these taxes, and must lose them, notwithstanding the just claim it has, and the lien created for its security. The bill contains too many elements of equity to be dismissed out of this court.

Application for rehearing denied.

[Barton v. Incorporation of Gadsden.]

## Barton v. Incorporation of Gadsden.

### *Prosecution for Violation of Municipal Ordinance.*

1. *Municipal ordinance prohibiting sale of spirituous liquors, repealed by subsequent ordinance prohibiting sale without license.*—A municipal ordinance prohibiting the sale of spirituous liquors under a penalty, and a subsequent ordinance prohibiting their sale without a license, the price of which is prescribed, being inconsistent and repugnant, the former is repealed by the latter.

2. *Repeal of penal statute or ordinance; effect on pending prosecutions.* By statutory provision, a pending prosecution is not abated by the repeal of the statute on which it is founded, unless otherwise provided by the repealing statute (Code, § 4449); but this statute does not apply to municipal ordinances, and pending prosecutions under such ordinances are abated by their repeal, unless expressly excepted from the operation of the repealing ordinance.

APPEAL from the Circuit Court of Etowah.

Tried before the Hon. JAMES E. COBB.

This was a prosecution for the violation of a municipal ordinance of the town of Gadsden, which provided that, from and after its passage, "it shall not be lawful for any person to sell, or otherwise dispose of vinous, spirituous, or malt liquors, or other intoxicating beverages or bitters whatever, within the corporate limits of Gadsden;" and imposed a penalty of \$50 for its violation. This ordinance, No. 63, was adopted on the 3d January, 1882; and under its provisions the defendant was arrested on the 24th March, 1882, and fined \$50 in the mayor's court. From this judgment he took an appeal, in August, 1883, to the Circuit Court; and the case was there continued, from term to term, until the July term, 1885, when a trial was had. On the trial, as the bill of exceptions shows, the defendant objected to the admission of said ordinance as evidence, on the ground that it had been repealed; and he offered in evidence another ordinance, No. 81, which was adopted on the 24th January, 1885, which prohibited the sale of liquors without a license, and fixed the price of a license at \$500. The court overruled his objections to the former ordinance, and admitted it as evidence; but sustained the plaintiff's objection to the latter ordinance, and excluded it. The defendant excepted to these rulings, and he here assigns them as error.

WM. H. DENSON, for appellant.

J. H. DISQUE, *contra*.



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CLOPTON, J.—Our conclusion renders unnecessary a decision of the question as to the power of the municipal authorities to adopt the ordinance No. 63. The ordinance was adopted in January, 1882; and declares, “it shall not be lawful for any person to sell, or otherwise dispose of vinous, spirituous or malt liquors, or other intoxicating beverages or bitters whatever, within the corporate limits of the city of Gadsden;” and subjects the offender to a fine of not less than fifty dollars. There are other provisions, relating to physicians and druggists. In January, 1885, the board of mayor and aldermen adopted the ordinance No. 81, which provides: “It shall not be lawful for any person, firm, company, or corporation to sell vinous, spirituous or malt liquors, within the corporate limits of the city of Gadsden, without first having paid for and taken out a license therefor.” The amount of license is fixed at five hundred dollars *per annum*, to be paid as provided in the ordinance; and any one violating its provisions “shall, on conviction, be fined not less than fifty, nor more than one hundred dollars, and may be imprisoned, not less than ten, nor more than thirty days, one or both, in the discretion of the mayor.” It is manifest that the two ordinances are repugnant to each other. The first is absolute prohibition, except the limited privileges granted to druggists and physicians; while the latter authorizes and requires a license to sell or otherwise dispose of such liquors, beverages and bitters, and makes it unlawful when done without having obtained the requisite license, or without having paid the amount to the treasurer; and the penalties are altogether different. The ordinance No. 81 is a revision and substitute of ordinance No. 63, and operates to repeal it by implication.

The appellant was tried and convicted by the mayor in August, 1882, and fined fifty dollars for a violation of ordinance No. 63. From this judgment he took an appeal to the Circuit Court, where the case was continued and pending until July, 1885, when a final judgment was rendered against him. The proceeding is a *quasi* criminal prosecution, and, according to the settled rule, the repeal of ordinance No. 63, out of which the prosecution grew, pending the appeal in the Circuit Court, and before trial, puts an end to the proceedings founded thereon, unless saved by some general statute, or by a saving clause in the repealing ordinance. Section 4449 of the Code, which saves the proceedings, where the law under which they are had is repealed, does not apply to the ordinances of municipal corporations, but solely to laws enacted by the General Assembly; and there is no saving clause in the repealing ordinance.—*Naylor v. City of Galesburg*, 56 Ill. 285; *City of Kansas v. Clark*, 68 Mo. 588. The ordinance under which the appellant was

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tried and convicted in the Circuit Court, was not in force at the time of the trial, and of the rendition of the judgment; and the proceedings were not saved.

The judgment must be reversed, and an order made dismissing the proceedings.

## Alabama Fertilizer Co. v. Reynolds & Lee.

### *Action on Promissory Notes, by Payee against Maker.*

1. *Testimony of witness or party, as to motive or intent.*—The motive or intent with which an act is done, or refused to be done, is an inferential fact, to which a witness can not testify, for want of the requisite knowledge; and the principle is, with us, extended to a party testifying as a witness for himself, because such testimony is not susceptible of contradiction.

2. *What constitutes partnership inter sese, and as to third persons.* Where two persons are associated together in the sale of commercial fertilizers on commission, but the only interest one of them has in the business is the right to have such quantities as he may desire for his own use at a discount of the commissions from the selling price, this does not make them partners as between themselves; but, if they hold themselves out to the public as partners, they are liable as such to third persons dealing with them in ignorance of the real facts.

3. *Authority of partner to bind partnership.*—Each partner is the agent of the partnership, as to all contracts and transactions within the scope of the partnership business, as tested by the nature of the particular business and its ordinary usages.

4. *Same; purchases on credit.*—When persons are engaged in the sale of merchandise as a business, purchases to keep up their stock are appropriate and necessary to the business, and such purchases are, as matter of common knowledge, made on credit, longer or shorter according to the usages of the particular business; and when a partnership is so engaged, each partner has the right to bind the other by such purchases on credit.

5. *Same; same.*—In the case of commission-merchants, engaged only in the business of selling on commission for others, purchases on their own account being outside of the scope of that business, one partner can not bind the other by a purchase on credit in the partnership name.

6. *Character of partnership business; how determined.*—Whether partners are engaged in business as merchants on their own account, or are selling on commission for others, is a question of fact, and is to be determined, not by any private agreement between themselves, but by the nature of the business actually done by them with the public.

7. *Estoppel against denial of partnership.*—When a partnership has been engaged for two years, under the management of the active partner, in buying and selling on their own account, it is too late for the other partner to allege that their legitimate business was confined to selling on commission, and that the purchases were made without his knowledge or consent.

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8. *Charge misleading jury.*—A charge which calls on the jury to institute a comparison between the probative force of the testimony of different witnesses, equally credible, and having equal means of knowledge, is calculated to confuse and mislead them, and should never be given; but the giving of such a charge is not a reversible error.

9. *Charges as to burden of proof.*—It is the duty of the court to determine, and to instruct the jury if necessary, on whom rests the burden of proof as to any material issue; and a charge which submits that question to the jury, or which places the burden of proof on the wrong party, is a reversible error.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. HENRY D. CLAYTON.

This action was brought by the appellant, a domestic private corporation, against John A. Reynolds and R. M. Lee, as partners doing business under the firm name of Reynolds & Lee; was founded on three promissory notes signed in said partnership name, each for \$2,705.67, dated May 1st, 1884, and payable to the order of the plaintiff, at the First National Bank of Montgomery, on the 15th October, November and December, respectively; and was commenced on the 31st March, 1885. The defendants jointly pleaded the general issue, and Reynolds filed a special plea of *non est factum*, verified by affidavit, averring that the note was not signed by him, nor by any one who was authorized to bind him; and the cause was tried on issue joined on these pleas.

On the trial, as appears from the bill of exceptions, it was proved on the part of the defendants, by their own testimony, that Reynolds, who was a planter, and resided in the county about seventeen miles from Clayton, engaged in the business of selling guano on commission in Clayton during the year 1880, and in 1881 associated Lee with him in the business, Lee being his son-in-law, under the firm name of Reynolds & Lee; that the business was to be done "upon consignment alone;" that Lee was to manage and control the business, pay all expenses and all losses, and receive all the profits, except that Reynolds was to have all the guano he needed for use on his plantation, without paying the commissions charged by the firm for selling. Under this arrangement the business was carried on for some time, and on the 17th November, 1882, a written contract was entered into between plaintiff, a private corporation engaged in the manufacture of commercial fertilizers in the city of Montgomery, and said Reynolds & Lee as a partnership; consignments and sales were made, and notes for the agreed price were executed by Lee in the name of Reynolds & Lee; sales were made by them to customers, notes for the agreed price taken in the firm name, collections and remittances made; and this continued until the notes were given on which this action was founded. But Reynolds and Lee each testified,



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that Reynolds had no knowledge of these various transactions. J. R. Rogers, the president of the plaintiff corporation, testified that, "in the winter of 1884-5, Lee applied to plaintiff to purchase guano for sale during the year 1884-5 on his own account, saying that Reynolds declined to become bound with him any more, and that he (witness) refused." This testimony was ruled out by the court, on motion of the defendants, "because the same was irrelevant and immaterial;" and plaintiff excepted to its exclusion. Said Rogers testified, also, "that said Lee, when negotiating the purchase under the contract of January 1st, 1884, stated to him (witness) that Reynolds was his partner, and was abundantly solvent; and that the sale was made on the strength of Reynolds' name as a partner." The defendants objected to this last statement of the witness, and duly excepted to the overruling of their objection.

C. P. Storrs, plaintiff's agent for the sale of fertilizers, testified that, in October, 1882, before the first sale by plaintiff to Reynolds & Lee, he went to Clayton on plaintiff's business, met Reynolds on the cars, and had a conversation with him, in which Reynolds stated "that he allowed Lee to use his name in the guano business;" that he thereupon made inquiries as to the solvency of Reynolds, and afterwards sold the guano to the firm on the faith of his solvency and credit; "and that he would not have sold the guano except upon the strength of Reynolds' name." The defendants objected to this last statement by the witness, and duly excepted to the overruling of their objection.

At the request of the defendants, in writing, the court gave the following (with other) charges to the jury:

"3. If the contract, under which Reynolds and Lee were associated in business, provided that the business to be carried on was to be an agency on commission only, then neither of them had authority to buy guano upon a joint account, without the consent of the other; although there may have been, under their contract, a partnership between them."

"6. The mere fact, if such fact is in evidence, that Reynolds permitted his name to be held out to the public as a partner of Lee in the business, the scope of which was the handling of guano upon consignment, was not such a holding out as justified the belief that he was a partner who would be bound for guano purchased by Lee on joint account."

"8. If the jury find, under the rules given them in the general charge on this point, that the testimony of Reynolds is entitled to equal credit with that of Storrs, then the testimony of Storrs is not to be taken by the jury over that of Reynolds, in matters where they conflict, if in fact they do conflict; and if such conflict is about material matters, and the burden of

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establishing them is upon the plaintiff, and the testimony of Storrs and Reynolds is all the testimony upon such disputed matters, then the jury will find that such matters are not established. Likewise, if the testimony of Lee is equal in weight to that of Rogers, then the testimony of Rogers is not to be taken over that of Lee, in matters about which they conflict, if in fact they do conflict; and if they conflict in material matters, the burden of establishing which is upon the plaintiff, and the testimony of Lee and Rogers is all the testimony upon such disputed matters, then the jury will find that such disputed matters are not established."

"10. The burden of proving Reynolds' liability in this action is upon the plaintiff, in every aspect in which the case is presented. The degree of proof required by law, in actions of this character, is to the reasonable satisfaction of the jury; and if plaintiff's proof falls short of this, then plaintiff can not recover."

The plaintiff excepted to each of these charges as given, and now assigns them as error, together with the several rulings on evidence to which, as above stated, exceptions were reserved.

J. N. WILLIAMS, for appellant, cited *Humes v. O'Bryan*, 74 Ala. 64; *Couch v. Woodruff*, 63 Ala. 466; *Wagner v. Simmons*, 61 Ala. 143; *Clark v. Taylor & Co.*, 68 Ala. 453; *McCrary v. Slaughter*, 58 Ala. 234; *Howze v. Patterson*, 53 Ala. 207; *Jemison v. Dearing*, 41 Ala. 283; *Nicholson v. Moog & Co.*, 65 Ala. 471.

J. M. WHITE, and H. D. CLAYTON, Jr., *contra*, cited *Baker v. Trotter*, 73 Ala. 277; *McCormick & Richardson v. Joseph & Anderson*, 77 Ala. 236; *Humes v. O'Bryan*, 74 Ala. 64; *Clark v. Taylor & Co.*, 68 Ala. 453; *Goetter, Weil & Co. v. Head & Co.*, 70 Ala. 532.

STONE. C. J.—The motive or intent with which an act is done, or refused to be done, frequently becomes a matter of pertinent inquiry in judicial administration. Before the enactment of our statutes making parties competent witnesses in their own behalf, there could be no direct proof of motive or intent, for no witness could have sufficient knowledge of another's mental operations to testify to them as facts. Hence, motive and intent were classed as inferential facts—facts to be inferred by the tribunal, from attendant facts in evidence. In this State, although differing from the rule declared in some other States, we refuse to allow parties, when testifying in their own causes, to give evidence of their own uncommunicated motives or intentions. We do this, because such testimony, in

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its nature, is insusceptible of contradiction. The result is that, with us, motive and intent remain as they were at common law—inferences to be drawn from surrounding facts and circumstances.—*Sledge v. Scott*, 56 Ala. 202; *Baker v. Trotter*, 73 Ala. 277; *McCormick v. Joseph*, 77 Ala. 236. The Circuit Court did not err in the several rulings on testimony offered.

The present suit is for the collection of three promissory notes, dated May 1, 1884, bearing the signature of Reynolds & Lee, due severally October, November and December, 1884, and payable to the Alabama Fertilizer Company. Reynolds interposed the sworn special plea of *non est factum*, but Lee is not shown to have made defense. There were verdict and judgment for defendants.

As we understand the testimony, there is no dispute of the facts, that a business was conducted, during the years 1883 and 1884, in the name of Reynolds & Lee, and that they were engaged in the sale of commercial fertilizers. Neither is there any dispute that Reynold knew of, and sanctioned the use of his name, as a member of the firm of Reynolds & Lee. Up to this point there can, under the testimony, be no reasonable ground for difference of opinion. Neither of the defendants disputes the foregoing facts. The precise form in which the defense was presented is, that while the associated names of Reynolds and Lee were permitted to be presented to the public as partners, they were not in fact partners as between themselves; and that the apparent partnership was formed solely for the purpose of selling fertilizers on commission, with no power to make purchases. Both Reynolds and Lee prove such to have been the case, and that the only benefit or interest Reynolds had, or was to have in the adventure, was that he, Reynolds, should have what fertilizers he desired for his own use, with a discount from the price of the commissions for selling. This testimony is not contradicted. If these be the facts, there was no community of risks—no common interest in the profits and losses—and hence there was no partnership *inter sese*.—*Smith v. Garth*, 32 Ala. 368; *Meaher v. Cox*, 37 Ala. 201; *Mayrant v. Marston*, 67 Ala. 453; *Tayloe v. Bush*, 75 Ala. 432.

But persons who are not partners between themselves, may render themselves liable to third persons as partners, by suffering their names to be used as such; and this principle is as sound in morals, as it is binding in law. The reason is, that such permitted use of one's name imparts credit to the supposed partnership, in equal ratio with the credit of the person allowing his name to be thus used. Hence it is that a nominal partner—one having no interest, but permitting himself to be held out as such—is as much bound by contracts made in the



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partnership name, as if he were a real partner.—*Nicholson v. Moog*, 65 Ala. 471; 2 Greenl. Ev. § 482; *Humes v. O'Bryan*, 74 Ala. 64, 82; Parsons on Part. \*87.

But partnerships are not bound by every contract an individual member may make in the firm name. To be binding, it must be appropriate to the business in which the partnership is engaged.—Story on Part., §§ 110 to 113; *McCreary v. Slaughter*, 58 Ala. 230, 235; *Humes v. O'Bryan*, *supra*. “Each partner is the agent of the firm, as to all transactions coming within the scope of the partnership business. This general authority is to be tested by the nature of the particular business to which the partnership relates, and its ordinary usages.”—*Clark v. Taylor*, 68 Ala. 453; Parsons on Part. \*95; *Wilkins v. Pearce*, 5 Denio, 541.

Commercial fertilizers have become an article of merchandise, well recognized, if not as extensively dealt in as other lines of merchandise are. This is common knowledge, and we must be presumed to be cognizant of it. Persons engaged in the sale of merchandise as a business, must, in the nature of things, keep up their supplies, or stock in trade; and hence authority to purchase is to be inferred, as a function appropriate to the business. It is also common knowledge, in this highly commercial age, that persons engaged in the sale of merchandise as a business, purchase their stock frequently, if not generally, on credit, longer or shorter as the usages of the particular line of trade may be. It follows that, in any of the general mercantile transactions, in which the retail dealer is accustomed to purchase in bulk and sell by retail to his customers, one member of a firm thus engaged has absolute power to bind the partnership by the purchase of goods or commodities in which they are accustomed to deal, as if all the members were present, contracting. Each partner is the agent of the firm, to make all contracts which come within the scope of the partnership dealings. This is the general rule, and applies to partnerships which are engaged in buying and selling on their own account.

But there is another class of traders called commission-merchants, who sell but do not buy. Their particular designation is derived from the fact, that they are the mere agents to sell the goods of others, for a commission. They are distinguished from the former class, sometimes by the advertised or proclaimed line of business in which they are engaged; sometimes by the fact that they disclose their principals, and profess only to be intermediaries to bring seller and buyer together; sometimes by selling in the name of the principal, and possibly in other ways. A commission business is confined to the making of sales for others; and one partner has

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no authority to bind his co-partner by purchases of goods to be sold in the business. His power to bind is confined to the scope of the partnership business, which is to sell, and account with fidelity for the proceeds of the sale.

But the question, whether a trader is a merchant dealing on his own account, or a commission-merchant selling for others, is, at last, but an inquiry of fact. It does not depend on any private agreement partners may have made among themselves, but upon the actual business they do. The public can not be supposed to have information of the private understandings of parties; but it can learn, and must be charged with a knowledge of, the particular line of trade in which the partnership is engaged. So, if a partnership be engaged in the purchase and sale of merchandise in their own name—in buying and selling as merchants do—this, in the absence of information to the contrary, will authorize the inference that they are merchants, and may be credited as such. One member of a partnership found so dealing may purchase and bind the firm, although directly opposed to some private agreement of the partners between themselves. And such purchase is no more binding on a real partner, than it is on one who simply permits his name to be held out to the public as a partner.

It is contended for appellee, Reynolds, and his testimony tends to prove it, that he had no knowledge that the firm of Reynolds & Lee were embarked in the business of buying and selling, until payment of the notes in suit was demanded of him. This, according to the testimony in this record, was near or quite two years after Lee commenced the purchase and sale of fertilizers on firm account. This plea of ignorance can not avail him. Having lent the use of his name as a partner in the firm of Reynolds & Lee, the public, without express information on the subject, could not know any limitation was imposed. They must judge of the use intended to be made of it, by the character of business done by the firm. If it did only a commission business, of course the right to purchase for re-sale would not be within the scope of its powers. If, on the other hand, it was engaged in the business of buying and selling, it was performing the functions of a commercial partnership; and the right to purchase on customary time would be within the scope of its presumed powers. The public would be authorized to act on such presumption, unless there was actual notice that the power did not exist. And Reynolds, if he did not know Lee was abusing his confidence, and employing the firm name in the purchase of merchandise, must be charged with a knowledge of it. The employment of the care and diligence which an ordinarily prudent man bestows on his own affairs, would have informed him that Lee was betraying

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his trust, and obtaining improper credit on the strength of his name. To allow his plea of ignorance to avail him, would be to reward him for his gross negligence, at the expense of a suffering public, who had nothing to arouse suspicion, or stimulate inquiry. What is said in this paragraph is applicable to appellant's phase of the case, one feature of which is the contention, that when the sale was made, neither it nor its negotiating agent had notice that Lee had not power to bind the firm for the purchase of fertilizers. It does not apply, if, when the sale was made, Lee had no such power, and plaintiff was informed of it.

We have attempted to define, so far as the wants of this case require, the purport of the expression, "scope of the partnership dealings." As between the partners themselves, this authority may be limited or controlled by special agreement; but, as to third persons, having no notice of such limitation, the partnership would be bound by the exercise of such general authority, by any one member of the firm.—*Clark v. Taylor*, 68 Ala. 453; *Parsons on Part.*, \* 102.

We have, several times, had occasion to criticise charges which called on the jury to compare the probative force of different witnesses, one with the other—the witnesses being equally credible, and having equal means of knowledge; and we have uniformly expressed our disapprobation of such mode of charging juries. It is calculated to confuse and mislead them.—*Dorgan v. The State*, 72 Ala. 173; *Childs v. The State*, 76 Ala. 93. Charge No. 8, given at the request of defendant, is objectionable on this account, and was well calculated to confuse and mislead the jury. It is matter of regret that charges so complicated should ever be given. But tendency to mislead is not, of itself, a ground of reversal. There are, however, two clauses in charge 8, which refer to the jury the ascertainment of matters of law, which should have been decided by the court. The errors occur in those parts of the hypothesis in which the jury are asked to institute a comparison of the testimony of Storrs and Reynolds, and of the testimony of Lee and Rogers; and are, in each case, almost identical in language. The following is one of the clauses which was submitted by the charge as an inquiry for the jury to pass on: "and if such conflict is about material matters, and the burden of establishing them is upon the plaintiff." It was the court's duty to inform the jury on whom the burden rested of establishing any given material fact.—*Spira v. Hornthall*, 77 Ala. 137.

Charge 10, given at the instance of defendant, asserts that "the burden of proving Reynolds' liability in this action is upon the plaintiff, in every aspect in which the case is presented."



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There was one aspect presented, in which the burden was on Reynolds; the alleged notice given to Storrs by Reynolds, of the nature of his interest in the firm of Reynolds & Lee. A charge which misplaces the burden of proof is a reversible error.—*Thompson v. Duncan*, 76 Ala. 334.

There is a clause in charge 6, which is apparently stated as fact, and without hypothesis, which should be avoided on another trial. The language is, "the scope of which was the handling of guano upon commission."—*Gr. So. R. R. Co. v. Roebuck*, 76 Ala. 277.

Charge No. 3 ignores all those tendencies of the testimony that Lee purchased and sold fertilizers, during the year 1883, in the name of Reynolds & Lee, and the effect of such purchases and sales on Reynolds' liability, as declared above. This charge should not have been given.—*Thompson v. Duncan*, 76 Ala. 334; *Tesney v. The State*, 77 Ala. 33; *Savery v. Moore*, 71 Ala. 236.

Reversed and remanded.

CLOPTON, J., not sitting.

## Koger v. Franklin.

### *Application for Revocation of Letters of Administration.*

1. *Revocation of administration improvidently granted.*—When letters of administration have been granted improvidently, or irregularly, the court granting has inherent power to revoke them, either *ex mero motu*, or on application of any person in interest.

2. *Grant of administration by probate judge to his son, and revocation thereof.*—A grant of letters of administration by a probate judge to his own son, though irregular, erroneous, and voidable, is not absolutely void; and it may be revoked, on the application of any person having an interest, by the register in chancery, sitting as probate judge *pro hac vice*.

APPEAL from the Probate Court of DeKalb.

Heard before the Hon. THOS. H. SMITH, Register in Chancery, sitting as Probate Judge.

In the matter of the petition of Sarah and Margaret Koger, minors, by their next friend, asking the revocation of letters of administration on the estate of Elijah Bouldin, deceased, granted by the Probate Court of said county, on the 10th July, 1885, to A. G. Franklin, by virtue of his office as sheriff of the county. The petitioners were grandchildren of said Elijah Bouldin, and heirs at law and distributees of his estate. Their

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petition was filed on the 28th December, 1885, and asked the revocation of said grant of administration because Hon. JOHN N. FRANKLIN, the judge of probate by whom it was made, was the father of said A. G. Franklin; and the petition was addressed to the register in chancery, sitting *pro hac vice* as the judge of probate, on account of the incompetency of the latter by reason of relationship. On the hearing, as the decree recites, the petitioners proved that said A. G. Franklin was, at the time of his appointment, neither an heir or distributee of the decedent's estate, nor a creditor, and that the appointment was made more than forty days after the death of the decedent; and the fact of relationship was admitted. On these facts, the court overruled and dismissed the petition; and this decree is now assigned as error.

L. A. DOBBS, M. W. HOWARD, and HEFLIN, BOWDEN & KNOX, for appellants, cited *Claunch v. Castleberry*, 23 Ala. 85; *Wilson v. Wilson*, 36 Ala. 655; *Jennings v. Moses*, 38 Ala. 402; *Bean v. Chapman*, 73 Ala. 140.

SOMERVILLE, J.—Where letters of administration on an estate have been granted irregularly, or improvidently, the Probate Court has the inherent power to revoke them, either *ex mero motu*, or on application duly made by any party in interest.—*Watson v. Glover*, 77 Ala. 323; *Broughton v. Bradley*, 34 Ala. 694; *Curtis v. Williams*, 33 Ala. 570.

The letters of administration sought to be revoked in this case were granted by the probate judge of DeKalb county to the appellee, who is shown by the evidence to be his son. It is insisted that the grant is voidable, if not absolutely void, and that it should have been revoked by the register in chancery, acting under the statute, *pro hac vice*, as probate judge, in view of the latter's disqualification to act in the premises.

The Code expressly provides, that no judge of any court "must sit in any cause or proceeding in which he is interested, or related to either party within the fourth degree of consanguinity or affinity, or in which he has been of counsel, without the consent of the parties entered of record, or put in writing if the court is not of record."—Code, 1876, § 540; Const. 1875, Art. VI, § 18.

In the earlier decisions of this court it was held, that the action of any judge in a matter where he was interested, other than orders which are merely formal, was *coram non judice*, and therefore absolutely void, so as to be assailable on collateral attack.—*State v. Casteberry*, 23 Ala. 85; *Wilson v. Wilson*, 36 Ala. 655. In the later decisions, however, it is held that such action is voidable only, and not strictly void.—*Hine v.*

[Sermon v. Black.]

*Hussey*, 45 Ala. 496; *Hayes v. Collier*, 47 Ala. 726. In *Heydenfeldt v. Towns*, 27 Ala. 423, a questionable distinction is made between cases where a judge is rendered incompetent by statutory inhibition, and those where he is disqualified because of interest under the rules of the common law. In the former, his action is said to be void, and in the latter only voidable.—Freeman on Judg. (3d Ed.) §§ 144–146. In *Plowman v. Henderson*, 59 Ala. 559, the probate judge, as in the present case, had appointed his son to be administrator of an estate; and the effort was made by a surety on the administrator's bond, against whom a judgment had been rendered, to assail the appointment collaterally as void. It was held that the action of the judge was manifestly improper, but was not void. It was observed, that "the judge stripped himself, by the appointment, of jurisdiction of every proceeding in the course of the administration which could be regarded as adversary, and not merely formal. It is not contemplated by the law," said BRICKELL, C. J., "that a judge shall, of his mere volition, thus divest himself of power and duty."

In this case we hold, that the grant of the letters of administration to the appellee was a voidable act, not only improper but erroneous, and that it should have been revoked on motion of the appellants, who are shown to be parties in interest, whose rights are liable to be prejudiced by the disqualification of the probate judge to sit in all matters pertaining to the settlement of the estate, other than those which are merely formal.

The judgment is reversed, and a judgment will be entered in this court revoking the letters, and setting aside the order of the court appointing the appellee administrator of the estate of Elijah Bouldin, deceased. The costs of this appeal will be taxed against the appellee.

## Sermon v. Black.

*Statutory Action in nature of Ejectment, by Decedent's Heirs against Purchaser at Administrator's Sale.*

1 *Sale of decedent's lands under probate decree; jurisdiction of court.* The principle is settled by repeated decisions of this court, that in the matter of the sale of the lands of deceased persons, whether for the payment of debts or for distribution, the jurisdiction of the Probate Court is statutory and limited, and must affirmatively appear from the record; that this jurisdiction attaches on the filing of a petition by a



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proper party, setting forth a statutory ground of sale; and that where this does not appear, the order of sale is void, and the sale is a nullity.

2. *Same; sufficiency of petition.*—A petition filed by an administrator, alleging “that there is no personal property, or property of any character, other than that above described [certain lands], belonging to said estate, which has come to the knowledge or possession of your petitioner, and that it is necessary to sell said lands for distribution among those entitled thereto, and to defray the expenses of this administration,” does not show a statutory necessity for the sale, and an order of sale founded on it is void.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Robert Black and others, against J. R. Sermon and his tenants, to recover certain lands, particularly described in the complaint; and was commenced on the 20th October, 1883. The plaintiffs were the children of Thomas W. Black, deceased, and claimed the lands as his heirs at law; and the defendants were in possession, claiming under a purchase by said Sermon at a sale made by James H. Perdue, as the administrator of the estate of said Thomas W. Black, under an order and decree of the Probate Court. The defendants pleaded the general issue, and made a suggestion of adverse possession and the erection of valuable improvements; and the cause was tried on issue joined on this plea and suggestion. It was proved on the trial, as the bill of exceptions shows, that the lands belonged to said Thomas W. Black at the time of his death, which occurred in the year 1868; that he died intestate, and in possession of the said lands; that letters of administration on his estate were granted by the Probate Court to James H. Perdue, but at what time does not appear; that said administrator filed his petition in said Probate Court, on the 13th September, 1873, asking an order to sell the lands; that the petition was granted, and the order of sale made on the 18th November, 1873; that the sale was made, was reported to the court in December, 1873, J. R. Sermon being the purchaser, and was confirmed by the court; that said Perdue afterwards made final settlement of his administration, and letters of administration *de bonis non* were granted to Jonas W. Jones; that said administrator *de bonis non* afterwards reported payment of the purchase-money by Sermon, and asked an order authorizing him to execute a conveyance to the purchaser; that the order was granted, and the deed executed pursuant to it; and that said Sermon entered into possession under his purchase, and erected valuable permanent improvements.

The petition for the sale of the lands described the lands of which the intestate died seized and possessed, stated the names and ages of the heirs and distributees, and then alleged, “that there is no personal property, or property of any character,

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other than that above described, belonging to said estate, that has come to the knowledge or possession of your administrator, and that it is necessary to sell said lands for distribution among those entitled thereto, and to defray the expenses of this administration;" and therefore prayed an order of sale "for the purpose of distribution." The order of court setting a day for the hearing of the petition described it as an "application to sell lands for the purpose of distribution among the heirs at law, alleging that said lands can not be fairly and equitably divided without a sale." The two witnesses, whose depositions were taken on interrogatories, testified as follows: "We think it is necessary to sell the lands for distribution among those entitled thereto, because we don't think the lands can be fairly and equitably divided among the heirs without a sale for that purpose." The order of sale described the proceeding as "an application to sell certain lands to make distribution among the heirs of said deceased," and recited that "it is made to appear to the court that said lands can not be fairly and equitably divided amongst the heirs without a sale thereof as prayed."

On this evidence, the court charged the jury, that they must find for the plaintiffs, if they believed the evidence. The defendant excepted to this charge, and he here assigns it as error.

GAMBLE & RICHARDSON, for the appellant.

L. M. LANE, *contra*.

CLOPTON, J.—The only questions raised by the record are, the jurisdiction of the Court of Probate to make the orders relating to the sale and conveyance of the realty belonging to the estate of Thomas Black, and the consequent sufficiency of the sale and conveyance by his administrator under such orders; inasmuch as it is not controverted that the legal title to the lands sued for resides in the plaintiffs, as heirs at law, unless they have been divested thereof by the proceedings in the Probate Court.

If there be any question which has been settled by the decisions of this court beyond the pale of doubt or controversy, it is that the jurisdiction of the Probate Court, in the sale of the real estate of a decedent, is purely statutory and limited, and must affirmatively appear from the record. The rule is equally applicable, whether the application is to sell for the payment of debts, or for distribution.—*Satcher v. Satcher*, 41 Ala. 26; *Robertson v. Bradford*, 70 Ala. 385; *Whorton v. Montague*, 62 Ala. 201; *Tyson v. Brown*, 64 Ala. 244. In either case, the jurisdiction of the court can be called into exercise only by an application in writing by a proper party, setting

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forth the facts which authorize the court to order a sale. The averment of the existence of the statutory ground of sale is necessary to confer jurisdiction. When the jurisdiction appears, subsequent errors and irregularities will not invalidate the sale on a collateral attack; but, if the jurisdiction does not appear, the order of sale is void, and the sale a mere nullity, working no divestiture of the estate and title of the heir.

The allegation of the application is, "that there is no personal property, or property of any character, other than that above described in paragraph 1 of this petition, belonging to said estate, that has come to the knowledge or possession of your administrator; and that it is necessary to sell said lands for distribution among those entitled thereto, and to defray the expenses of this administration." Passing over the claim of a necessity to sell to defray the expenses of administration, which can not be charged on the lands, unless debts of the decedent are shown, for the payment of which the lands are liable (*Garrett v. Garrett*, 64 Ala. 263); it is too manifest for argument, that giving the petition a liberal construction, and making every intendment in favor of its sufficiency, it does not contain an allegation of the statutory ground of sale, or allegations of equivalent import, or of facts from which it may be necessarily implied.

There is no error in the record.

Affirmed.

## Westbrook v. Fulton.

### *Action for Unlawful Detainer of Land.*

1. *Proof of notice.*—Plaintiff's agent having four copies of a notice to be served on the defendants, delivering a copy to each of the three, and retaining one copy, which is produced on the trial, notice to produce the copies served is not necessary to render it competent as evidence, since each of the four papers is equally an original.

2. *Abstract charge.*—A charge asked, based on facts which there is no evidence tending to establish, is properly refused, because abstract.

3. *Charge misleading, or invading province of jury.*—When the testimony is indeterminate, circumstantial, or such that inferences of fact are necessary to complete its probative sufficiency, the rule imperatively requires that, in charging the jury, nothing shall fall from the lips of the presiding judge which tends in the slightest degree to invade their peculiar province in weighing and sifting the evidence; though the court may give proper instructions as to the burden of proof, legal presumptions, or any thing else that is merely matter of law.



[Westbrook v. Fulton.]

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by E. K. Fulton, against J. C. Westbrook, Samuel Torrey, and E. C. Mackey; and was commenced before a justice of the peace, on the 5th February, 1885. The complaint alleged that the plaintiff was seized and possessed, in February, 1883, of the land which he sought to recover; that the defendants entered as his tenants "until the 2d September, 1892; and said tenancy having been forfeited, by a failure and refusal on the part of defendants to pay their lease, or royalty, as per contract of renting, refused to deliver possession, on demand in writing, but unlawfully withhold and detain the same." In the City Court, on appeal, the defendants filed two special pleas; the first alleging that, after the commencement of the tenancy, there was a modification of the terms of the lease, by which it was agreed that the royalty on the coal mined from the lands should be paid on the 15th of each month, instead of the 1st, and that the new contract was in force when the action was commenced; and the second, that plaintiff had accepted payment of the royalty after the first day of each month, and had thereby induced defendants to believe that strict payment on the day would not be demanded, and was estopped from insisting on the clause of forfeiture in the lease. Issue seems to have been joined on both of these pleas.

On the trial, as appears from the bill of exceptions, the plaintiff proved that the defendants entered into the possession of the land, for the purpose of mining coal, under a written lease for ten years, commencing September 1st, 1882; and that the lease contained the following (with other) stipulations: that the defendants should pay, "at the end of each month, a royalty of twelve and a half cents per ton for all coal mined on the land, and pay \$7.50 per month, at the end of each month, whether or not coal enough was mined to make that sum;" and that if they failed to pay the royalty as stipulated, plaintiff might "declare the lease forfeited, and enter on and take possession of said land." He proved, also, that on the morning of January 30th, 1885, he demanded payment of the royalty (or rent) for that month, and that it had not been paid. He proved, also, by N. Hawkins, that he, acting as agent for the plaintiff, served on each of said defendants a written notice, declaring the lease forfeited, and demanding possession of the premises. The witness, as his testimony is set out in the bill of exceptions, did not state when he served this notice; but the notice which he produced, and which he said was "a correct copy" of the notices served, was dated February 2d, 1885. The court admitted this paper as evidence, against

the objection of the defendants, but offered to exclude it if they would produce the notices served on them, which they failed to do; and to the admission of this evidence the defendants excepted.

The defendants introduced evidence tending to show that, on the 25th February, 1884, they sub-leased the premises for mining purposes to Harbin & McKinney, for the term of five years; that the sub-lessees were to pay the royalty on the 15th day of each month; that the plaintiff consented to this sub-lease, "in consideration of defendants' paying him a greater royalty, and to receive the royalty (or rent) on the 15th day of each month; that the same was thereafter paid to him by defendants, according to said last agreement, until May 30th, 1884, when said Harbin & McKinney surrendered their sub-lease, and defendants again took charge of the leased premises; that no further contract was made, as between plaintiff and defendants, as to the time for the payment of the royalty (or rent) due him; also, that they (defendants), during the term of their tenancy, have paid the royalty (or rent) due to plaintiff, sometimes before, and sometimes after the day fixed by the contract, without objection on the part of the plaintiff; and that on the 2d February, 1885, they tendered to plaintiff the royalty (or rent) due for the preceding month of January, and he refused to accept it." The plaintiff introduced evidence in rebuttal, "tending to show that, after the surrender of the sub-lease by Harbin & McKinney, it was understood and agreed between him and the defendants that the royalty (or rent) due him should be paid, as provided by their original agreement or lease, at the end of each month for which it accrued; that the same was thereafter so paid until the month of January, 1885; and that he notified said Westbrook (one of said defendants), on or about January 1st, 1885, that he intended thereafter to hold them to a strict performance of the terms of their lease."

On this evidence, the defendants requested the court, in writing, to charge the jury as follows: "The forfeiture claimed in the contract here relied on by plaintiff, like other forfeitures, is looked on by the courts with disfavor, and, being intended for the benefit of the plaintiff, slight evidence of waiver on his part is sufficient to show that it has been waived; and this may be done, either by express agreement, or by proof of subsequent dealings, on which the defendants relied, on which they had a right to rely, and which was calculated to make them believe that prompt payment would not be insisted on by plaintiff." The court refused this charge, and the defendants excepted to its refusal.

The rulings on evidence, the refusal of the charge asked, and other matters, are now assigned as error.

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R. H. PEARSON, and O. KYLE, for appellants.

HEWITT, WALKER & PORTER, *contra*.

STONE, C. J.—As we understand the testimony of the witness Hawkins, he, as the agent of Fulton, plaintiff below, had in his possession four copies of a notice, issued in Fulton's name, three of which he served on the several defendants, and retained the fourth. The retained copy the witness produced on the trial. It bore date February 2d, 1885, and gave notice to each of the defendants that Fulton, their landlord, claimed a forfeiture of the leasehold interest, by reason that the defendants, his tenants, had failed to pay the rental and royalty therefor, according to the terms of the letting. This paper, and the testimony of the witness Hawkins, were offered, to prove that Fulton had elected to declare the lease forfeited, and had, in this way, given the defendants notice of such election. There was objection to the introduction of this paper in evidence, to prove that Fulton elected to treat the lease as forfeited. The court allowed the paper to go in evidence to the jury, and this is the subject of the first exception. The point of the objection was, and is, that the paper offered was but a copy, and no notice had been given to produce the originals, which had been left with the defendants.

As we understand the bill of exceptions, these papers or notices did not sustain to each other the relation of original and copy papers. One was as much an original as the others. The language of the witness was, "that acting for plaintiff, at his request, he handed to each one of the defendants a paper writing, of which he retained a correct copy;" which copy plaintiff produced, and offered to prove by said witness. If the statement of this witness be true, each of the papers, before service, was as much an original as the others were, for they were correct copies of each other. *Copy*, in the sense here used, does not mean that the notices served were first written, and the retained paper then made like them. Its natural sense and interpretation are, that each was a copy of the others, in the sense that one newspaper is a copy of each and every other newspaper printed at that time, and on that form; or that one book, of a given edition, is a copy of every other book of the same edition. This statement by the witness, that he retained a "correct copy," can not change the true nature of the transaction. Its most natural interpretation is, that the notice was prepared in quadruplicate form, and three were served, and one retained. The record does not present the question of primary and secondary evidence.—1 Greenl. Ev. § 561; 2 *Ib.* § 322; *Dumas v. Hunter*, 30 Ala. 75. If the papers were not quadru-



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plicates of each other, the defendants had it in their power to correct the error, by producing the copies served on them.

The charged asked by defendants, and refused, had no evidence of waiver to base it upon, and it was rightly refused on that ground.—*Hill v. Townsend*, 69 Ala. 286. There is another objection to this charge. After referring to the subsequent dealings of the parties, as circumstances to which the jury might look in determining whether the plaintiff had waived his right to claim a forfeiture of the lease, the instruction contains the following clause, which is stated more in the form of asserted fact, than of hypothesis: "On which the defendants relied, on which they had a right to rely, and which were calculated to make them believe that prompt payment would not be insisted on by plaintiff." Under the most favorable construction, this charge was liable to mislead, and was rightly refused on that account. When testimony is indeterminate, circumstantial, or is such that inferences of fact are necessary to complete its probative sufficiency, the rule is all the more imperative, that in charging the jury nothing shall fall from the lips of the judge which tends, in the slightest degree, to invade the peculiar province of that body to weigh and sift the testimony, and ascertain, for themselves, the facts it establishes. This does not interdict proper instructions as to the burden of proof, legal presumptions, or anything else which is matter of law. The jury being bound to accept the law from the court, and to act upon it, the presiding judge is equally bound to leave to the jury the ascertainment of facts which exist in parol.—*Clark's Manual*, § 2505; *Railroad v. Roebuck*, 76 Ala. 277.

Affirmed.

## Trimble v. Anderson.

### *Action for Libel.*

1. *When action lies.*—To support an action for libel, when the complaint alleges no special damage, the publication must be libellous *per se*—must charge an indictable offense, or must tend to subject the plaintiff to public hatred, contempt, or ridicule, or to exclude him from association with virtuous and honorable men.

2. *Same.*—A notice published in a newspaper, warning all persons against trading for two notes, alleging that the plaintiff had obtained them, without consideration, from a person whose mental condition at the time was such as incapacitated him for business, is not

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libellous *per se*; for he might have procured them by gift, and without any knowledge or suspicion of the donor's mental incapacity.

3. *Demurrer*.—Whether the publication, as set out in the complaint, is libellous *per se*, is properly determined by the court on demurrer, notwithstanding the averment that it was made falsely, maliciously, and with the intent to defame plaintiff.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. HENRY C. SPEAKE.

This action was brought by Alonzo F. Trimble, against W. R. Anderson and A. R. Anderson, to recover damages for the publication by them of an alleged libel, in a newspaper published in the town of LaFayette in said county. The article was headed *Notice*, was signed by the defendants, and in these words: Whereas A. F. Trimble did obtain from J. R. Anderson, for no consideration, on the 15th November, 1884, one note payable one day after date to Fannie Trimble, for \$500; also, at the same time, one note payable one day after date to Mary V. Lanier, for \$400: we warn all persons against trading for said notes, as said J. R. Anderson's mental condition was such at the time as to incapacitate him for business, and said notes will be contested by law." The complaint claimed damages of the defendants, "for falsely and maliciously publishing of and concerning plaintiff," in a specified newspaper, "the following false and defamatory matter, with intent to defame him," setting out the publication. The court sustained a demurrer to the complaint, on the ground that the words were not actionable; and the judgment on the demurrer is now assigned as error.

DOWDELL & DENSON, for the appellant.—The demurrers ought to have been overruled, because the publication was libellous.—*Cooper v. Greely*, 1 Denio, 347; *White v. Nichols*, 3 How. 449; *Stow v. Converse*, 8 Amer. Dec. 189; *VanNess v. Hamilton*, 19 Johns. 367; *Steele v. Southwick*, 9 Johns. 214; *Riggs v. Denniston*, 3 John. Cas. 198; 2 Wils. 403; *Dexter v. Speer*, 4 Mason, 115; *Com. v. Wright*, 1 Cush. 46; *Miller v. Butler*, 6 Cush. 7; Cooley on Torts, § 206; 4 Wait's Ac. & Defenses, 281; Townshend on Libel, § 176. The demurrer admits that the words were spoken falsely, maliciously, and with intent to defame plaintiff; and the court should have left the jury to decide, under proper instructions, whether the publication was libellous.—4 Wait's A. & D. 291, § 5.

W. H. BARNES, *contra*, cited *Henderson v. Hale*, 19 Ala. 154; *Rice v. Simmons*, 2 Harr. 417, or 31 Amer. Dec. 766; 6 Ohio, 531; *Colley v. Reynolds*, 6 Verm. 489; 31 Amer. Dec. 556; 37 Amer. Dec. 773.

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SOMERVILLE, J.—The action is one for libel. The complaint contains no averment of any special damage alleged to have been sustained by the plaintiff. To be actionable, therefore, the publication made by the defendants concerning the plaintiff must be libellous *per se*—that is, it must charge an indictable offense, or its tendency must be to subject the plaintiff otherwise to public hatred, contempt, or ridicule, or to exclude him from association with virtuous and honorable men. If the words used, when fairly interpreted, involve no imputation having this tendency, the charge that they were published falsely and maliciously can not impart to them a libellous signification or nature.—*Henderson v. Hale*, 19 Ala. 154; *Cooley on Torts*, 205–208; *King v. Root*, 21 Amer. Dec. 102; *Rice v. Simmons*, 31 Amer. Dec. 766.

The words used in the publication set out in the complaint charge no indictable offense. They impute no fraud, dishonesty, or other moral turpitude to the plaintiff; nor can we see that they tend in any way to render him odious in public estimation, or to exclude him from respectable associations. The substance of the publication is, that the plaintiff had obtained certain promissory notes from the father of the defendants, while his mental condition incapacitated him for business, and without paying any consideration for such notes. It may be that the plaintiff obtained the notes in question by gift, and without any knowledge, or even suspicion, of the father's mental condition. In any event, the publication, in our opinion, is not libellous.

The question as to whether a libellous signification could be attributed to the words used was properly determined by the court on the demurrer to the complaint.—*Henderson v. Hale*, 19 Ala. 154, 160; 2 Greenl. Ev. (14th Ed.) § 411, note (a); *Shattuck v. Allen*, 4 Gray, (Mass.) 546.

Affirmed.

## Kyle v. Bellenger.

### *Bill in Equity to enforce Vendor's Lien on Land.*

1. *Intention of parties to contract; how ascertained or proved.*—In the construction of a written contract, the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction, and the surrounding circumstances; and they can not be allowed to testify as to their understanding and intention.

2. *Waiver of vendor's lien.*—When the vendor of lands executes a



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conveyance to the purchaser, taking the note of a third person, indorsed by the purchaser, for the agreed price, or the deferred payments, the vendor's lien, as arising by implication of law, is presumptively waived.

3. *Reservation of lien by contract.*—When lands are sold on a cash basis, part of the price being paid in cash, part in the notes of third persons indorsed by the purchaser, and his due-bill taken for a small balance; an express stipulation in the conveyance, that the vendor “in no way waives the vendor's lien on said land by reason of said personal securities,” does not show the reservation of a vendor's lien such as arises by implication of law, the liability of the purchaser on the indorsed note being only secondary, but creates a contract lien in the nature of an equitable mortgage, which may be enforced so soon as the note is due and unpaid, without waiting for a judgment and execution against the maker.

4. *Variance.*—When a bill seeks to enforce a vendor's lien on land, alleging that the note of a third person, indorsed by the purchaser, was taken as additional security for a part of the agreed price, without waiving the vendor's lien; and the evidence shows that a contract lien, in the nature of an equitable mortgage, was expressly reserved, the variance is fatal to relief, but the bill will be dismissed without prejudice.

APPEAL from the Chancery Court of Etowah.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on the 11th March, 1885, by R. B. Kyle, against W. C. Bellenger and his wife; and sought to enforce an alleged vendor's lien on a tract of land, for a balance of purchase-money remaining unpaid. The contract of sale was made in December, 1882, the agreed price being \$850; of which amount \$200 was paid in cash, Bellenger gave his due-bill for \$48.59, and complainant accepted the note of B. McClendon for \$300, indorsed by said Bellenger, for the balance. The note of McClendon was dated the 7th April, 1882, and due the 1st January, 1884; and the bill alleged that it was given and accepted “as additional security” for that part of the purchase-money, and with the express understanding that the vendor's lien on the land was not thereby waived. The complainant and his wife, on the day the contract was consummated, executed a deed conveying the land, at the instance of Bellenger, to his wife. The bill alleged that the due-bill had been paid, and that a partial payment of \$74 had been made on McClendon's note; that complainant had, at the instance of Bellenger, in February, 1885, instituted an action on the note against Bellenger, which suit was still pending; and he claimed a vendor's lien on the land for the unpaid balance. The chancellor overruled a demurrer to the bill, but dismissed it on final hearing on pleadings and proof, yet “without prejudice to the filing of another bill, should he fail in collecting out of said McClendon the money due from him.” This decree is now assigned as error.

W. H. DENSON, for appellant.—The conveyance contains

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and declares an express reservation of a lien and charge on the land for the unpaid purchase-money, and that it is not effected "by reason of said personal securities."—*Hall v. M. & M. Railway Co.*, 58 Ala. 10-22; *Butts v. Broughton*, 72 Ala. 294-98; *Newlin v. McAfee*, 64 Ala. 357; *Bush v. Garner*, 73 Ala. 162; *Bedford v. Burton*, 106 U. S. 338-41; *Ober v. Gallagher*, 93 U. S. 199; 1 Jones' Mortgages, §§ 166-7, 205, 228-31; 3 Pomeroy's Equity, §§ 1255-59, and notes. The complainant had two remedies, which he might pursue at one and the same time—an action at law for the debt, and a bill in equity to enforce his lien; and, if he had not executed a conveyance, he might also have maintained ejectment for the land itself. *Duval v. McLosky*, 1 Ala. 708; *Micou v. Ashurst*, 55 Ala. 607; *Chapman v. Lee*, 64 Ala. 483; *Whitehead v. Lane*, 72 Ala. 39; *Bankhead v. Owen*, 60 Ala. 457; *Ober v. Gallagher*, 93 U. S. 199; *Scott v. Ware*, 64 Ala. 185. A creditor may take as many securities for his debt as he can obtain, and may prosecute them all concurrently, though he can have but one satisfaction. In this case, the lien on the land is expressly reserved, and is not waived by the personal securities—*Union Bank v. Laird*, 2 Wheaton, 390; *Ober v. Gallagher*, 93 U. S. 208; 3 Ch. Ap. (Eng.) 769; *United States v. Hodge*, 6 How. 279; Colebrooke's Col. Sec., §§ 109-11; 6 Wait's Ac. & Defenses, 562, § 4. There was no necessity that Bellenger should have signed a note, bill, bond, or other evidence of the debt. *B. & L. Asso. v. Robertson*, 65 Ala. 388; *Russell v. Southard*, 12 How. 139. McClendon's note being transferred as collateral security, there was no necessity that complainant should sue on it, or offer to return it, in order to maintain an action on the original indebtedness, or consideration.—*Trotter v. Crockett*, 2 Porter, 401; *Rives v. McLosky*, 5 Stew. & P. 330; *Lewis v. United States*, 92 U. S. 622 *Union Bank v. Laird*, 2 Wheat. 390; Colebr. Col. Sec., §§ 109-10. That the right to sue on the original debt was not even suspended by the note on McClendon, see *The Kimball*, 3 Wall. 37; *Wheeler v. Shræder*, 4 R. I. 383; 6 Wait's Ac. & D., 557, § 2; *Ib.* 560, § 3; *Ib.* 564, § 6.

DUNLAP & DORTCH, *contra*.—The contract between the parties is to be determined by the writings signed and executed between them. The effect of defendant's indorsement of McClendon's note is well settled, and can not be varied by parol evidence.—*Day v. Thompson*, 65 Ala. 269; *Scott v. Myatt & Moore*, 24 Ala. 494; 2 Dan. Neg. Instr., 688-9; 33 Amer. Rep. 447. The conveyance recites and shows payment of the purchase-money, and leaves no room for the assertion of a vendor's lien. Whatever lien or charge is reserved or created

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by the deed, if it extends to the McClendon note, is dependent on the exhaustion of legal remedies against him, and no right of action had accrued when the bill was filed.—*Thomason v. Cooper*, 57 Ala. 560.

CLOPTON, J.—In December, 1882, the appellant, Kyle, sold to Bellenger the lot of land in the pleadings described, and, with his wife, executed a conveyance to the wife of Bellenger. The deed recites, “that the said Kyles have this day, for and in consideration of eight hundred and fifty dollars to them paid by said Bellenger—two hundred dollars in cash, and six hundred and fifty dollars in following described notes, indorsed by said Bellenger, and collection thereof guaranteed free of expense to said Kyle, to-wit,” &c. Here follows a specific description by dates, amounts, and times of maturity of four several notes made by third persons, and a due-bill of Bellenger for forty-eight 59-100 dollars. Among the notes described is one for three hundred dollars, made by B. McClendon, dated April 7, 1882, and payable January 1, 1884. The other notes, and the due-bill, have been paid. The bill is brought by appellant to enforce a vendor’s lien for an amount of the purchase-money, as due by Bellenger, equal to the balance unpaid on the McClendon note.

Immediately following the description of the land conveyed, the deed contains a provision in these words: “And it is expressly understood, that the said Kyle in no way waives the vendor’s lien on said lot, by reason of said personal securities.” The contestation between the parties arises on the construction, force and application of this clause of the conveyance. The complainant insists, that the purchaser is primarily bound, by the contract, for the purchase-money; that the notes were taken merely as collateral securities; and that the note of McClendon is only important, and referred to, as a means of ascertaining the amount of the purchase-money due by Bellenger. The defendants contend, that the notes were taken, *pro tanto*, in payment of the purchase-money; that the purchase-money being paid, there can be no vendor’s lien; that the effect of the provision in the deed is to carve out a lien, as security for Bellenger’s indorsements on the notes; and that such lien can not be enforced, until the requisite steps have been taken to charge him on his indorsement. We do not concur with either party in the contested propositions, as respectively asserted. In construing the contract, in reference to the provision of the deed relating to the non-waiver of the vendor’s lien, we shall not regard the testimony of the parties, so far as it respects their understanding and construction, but shall consider the parol evidence only as to the attending facts and circumstances, which



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may illustrate the character of the transaction. From the writings, the nature of the transaction, and the surrounding circumstances, the intention and meaning of the parties must be ascertained.

There is no controversy, that a vendor of land, who executes a conveyance, without taking independent security for the purchase-money, has a lien on the land for its payment, which a court of equity will enforce against the vendee, and all persons claiming under him, except *bona fide* purchasers without notice; there being no waiver of the lien, express or implied. But, if a vendor makes a conveyance, and takes a distinct and separate security for the purchase-money, such as a note of a third person, indorsed by the vendee, the lien is presumptively waived.

Without an agreement, expressed in the deed, or otherwise, the lien of complainant, by reason of the notes of others, indorsed by the purchaser, having been taken, would be regarded as waived. This consequence was sought to be avoided, by expressing in the deed that the lien was not waived.

No obligation, or note, or other evidence of a promise or engagement for the payment of the consideration price of the land, in excess of the cash payment, was required or taken from Bellenger, other than his indorsements of the notes, and his due-bill. His liability as indorser on such paper is secondary, and conditioned on proper proceedings being instituted and perfected to charge him as such.—Code, § 2112. Such conditional liability is incompatible with an intention, and with the theory, that he should be primarily bound. The sale of the land was made on a cash basis. The due-bill was given for the balance of the agreed cash price, after deducting the cash payment and the estimated cash value of the notes. The execution of the due-bill, under such circumstances, rejects the idea of a primary liability for any larger amount. There never has been a time when Bellenger was liable to a suit at law and a recovery for the amount represented by the notes indorsed by him. There was no primary indebtedness, for which the notes could have been taken as collateral security. The vendor's lien, which only arises *by implication of law*, is not created, unless there be a debt unpaid, which was contracted in the purchase of land, and which the purchaser, if *sui juris*, is, or was at some time, liable to pay without condition.—*Thomason v. Cooper*, 57 Ala. 560. The complainant has no lien, such as is sought to be enforced on the case made by the bill.

Though a vendor may execute a conveyance, and take the notes of third persons indorsed by the vendee, he may reserve a lien in the deed, which is enforceable in equity. A lien, thus reserved, is not the vendor's lien arising by implication of law,

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but is created by, and dependent on contract—a contract that the land shall be charged with a lien until the purchase-money is paid.—*Hall v. M. & M. Railway Co.*, 58 Ala. 10. It is not essential that there shall be a primary or absolute indebtedness owing by the purchaser, to make a contract reservation of a lien effective. It may be reserved for the payment and satisfaction of any security, which the vendor may take for the purchase-money. A lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as partaking of the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give effect as such in furtherance of the agreement of the parties, if there appears an intention to create a security. Says Judge STORY: “If the transaction resolves itself into a security, whatever may be its form, it is in equity a mortgage.”—*Flagg v. Mann*, 2 Sum. 486; 1 Jones on Mort., § 162; *Ober v. Gallagher*, 93 U. S. 199; *Bedford v. Burford*, 106 U. S. 338. Neither is any particular form of words necessary to the reservation of a lien in a deed. Any words that make manifest an intention to retain a lien, will be sufficient in a court of equity, which looks through the form to the substance.—*Moore v. Lackey*, 53 Miss. 85. The provision of the deed is tantamount to an express reservation of that which is not waived.

The remaining inquiry is, for what purpose was the lien retained, and how far is it applicable? While the indorsed notes are described in the deed as in part payment of the amount agreed to be paid for the land, and as forming part of the consideration, they are not in satisfaction and extinguishment of the consideration price. Rather, they constitute a substitute for, or representative of the purchase-money, *pro tanto*, and are in stead of money or of the individual note of the purchaser, though operating to exempt him from personal liability, other than by reason of his indorsement. Where the note of a third person is taken by the vendor, and a lien is reserved in general terms, the evident intention is to reserve, what would otherwise be regarded as waived,—a security on the land for the full payment of the consideration. With this object the operation of the lien must be commensurate. To confine the operation of the lien not waived in the deed, as a security for the secondary and conditional liability of the purchaser as an indorser, without words of limitation, and not as cumulative to the security given by his indorsement, is too restrictive. From the character of the transaction, notes having been taken as part consideration for land sold at a cash valuation, and a vendor's lien retained generally, the reasonable and satisfactory inference is, that the lien was retained to secure the payment of such part

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of the consideration as was not paid in money—the notes and the due-bill.

It follows, that the complainant need not make Bellenger's liability as indorser absolute by suit, judgment, and proper return of execution against the maker of the unpaid note, before filing a bill to enforce the lien. His right of action, in this respect, accrued when the note matured, and remained unpaid. But, on the case made by the bill—to declare and enforce a vendor's lien for a debt contracted in the purchase of the land, primarily due and owing by Bellenger, and for which the notes were taken as collateral security—the complainant can not obtain relief enforcing a lien reserved by contract as security for the payment of one of the notes, where there is no primary liability on the purchaser.

The decree of the chancellor will be amended, so as to dismiss the bill without prejudice generally; and as amended, it is affirmed at the costs of appellant.

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## Reed v. Summers.

### *Motion for Summary Judgment against Sureties on Official Bond of County Superintendent of Education.*

1. *Action on bond; who are proper parties defendant; amendment striking out defendant improperly joined, or discontinuance.*—On the death of one of several joint obligors, the remedy for a breach necessarily becomes several, in the absence of a statute authorizing a joint action against the survivors and the personal representative of the deceased; but, if the personal representative of the deceased is improperly joined as a defendant with the survivors, his name may be struck out by amendment, or a discontinuance entered as to him, without thereby discontinuing the action as against the others.

2. *Summary proceeding against defaulting county superintendent of education, and sureties on bond; joinder of administrator with survivors.* On the death of a defaulting county superintendent of education, there is no statute which authorizes a joint action, or summary proceeding by notice and motion, against his personal representative and the sureties on his official bond; and if the personal representative is improperly joined as a defendant in such action or proceeding, his name may be struck out by amendment, or a discontinuance entered as to him.

3. *Same; lies when, and against whom.*—The statute which gives a summary proceeding, by notice and motion, in favor of a county superintendent of education, against his defaulting predecessor, "who has resigned, removed from the county, or been legally removed from office, or whose term of office has expired, and the sureties on his official bond, or any of them" (Code, § 3397, subd. 3), applies also where the defaulter dies before the expiration of his term of office, and authorizes a suit against the surviving sureties alone.



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4. *Official bond of county superintendent; filing copy with State superintendent.*—The failure to file a copy of the county superintendent's official bond with the State superintendent of education, as required by law (Code, § 906), is no defense to him or his sureties, in an action for a default; and the court would presume, if necessary, in the absence of averment to the contrary, that a copy of the bond was properly filed and approved.

APPEAL from the Circuit Court of Lamar.

Tried before the Hon. S. H. SPROTT.

This was a summary proceeding, by notice and motion, in the name of B. F. Reed, as county superintendent of education of Lamar county, against W. A. Young, as administrator of the estate of J. M. I. Guyton, deceased, who was the former county superintendent, and against A. A. Summers and others, sureties on the official bond of said Guyton as such superintendent; and was commenced on the 24th February, 1883. All of the defendants were served with process, and all of them appeared. At the return term of the process, the plaintiff entered a discontinuance as to said Guyton's administrator; and the other defendants thereupon moved to dismiss the case, on the ground that it was discontinued as to all of them; which motion the court overruled and refused. The defendants then demurred to the motion, assigning four special grounds of demurrer. The court sustained the demurrer, on each of the grounds assigned; and, the plaintiff declining to amend, rendered judgment final for the defendants. The plaintiff appeals, and assigns the judgment on the demurrer as error.

MCGUIRE & COLLIER, J. J. RAY, and THOS. N. MCCLELLAN, for the appellant, cited *Mock v. Walker*, 42 Ala. 668; *Reynolds v. Simpkins*, 67 Ala. 378; *Beard v. Br. Bank*, 8 Ala. 344; *Bondurant v. Woods*, 1 Ala. 543; *Ex parte Wilson*, 54 Ala. 296; *Governor v. Powell*, 23 Ala. 579; *Boving v. Williams*, 17 Ala. 517; *Marion County v. Brown*, 43 Ala. 114; *Sprowl v. Lawrence*, 37 Ala. 674.

NE SMITH, SANFORD & YOUNG, *contra*.

STONE, C. J.—J. M. I. Guyton was appointed county superintendent of education for Lamar county, and in November, 1881, executed a bond as such superintendent, with the appellees in this case as his sureties. The appointment was for two years.—Code of 1876, § 916. Guyton died before the two years expired, and Reed was appointed his successor. The present suit was instituted by Reed, the successor, in February, 1883, before the two years expired; and its purpose is to recover for an alleged default, or deficiency in Guyton's ac-

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count as superintendent. The proceeding was by motion and notice, and claimed a summary judgment under section 3397, subd. 3, of the Code of 1876. The motion and notice proceeded at first against Young, Guyton's administrator, and all the sureties on his bond, and all were served as joint defendants. At the term of the court to which the notice was returned executed, the plaintiff took an order of discontinuance as to Young, the administrator of Guyton, and sought to prosecute the suit against the others, who were all the sureties on Guyton's bond. The appellees claim that this was a discontinuance of the suit.

When one of two or more joint obligors dies, the remedy at law for the enforcement of the contract becomes thereby necessarily several, unless there is a statute which authorizes the joint prosecution of such claim. The reason is, that no joint judgment can be rendered in a case thus circumstanced. A judgment against the one is *de bonis testatoris, vel intestatis*; against the other, *de bonis propriis*. There is no statute authorizing a joint suit, or joint recovery, in such a case as this. We have, then, the case of an improper joinder of parties defendant, and the amendment simply discontinued the action as to the party improperly sued, and against whom no recovery could be had in the action as brought. In fact, no recovery could have been had by motion and notice against Guyton's administrator, if he had been sued alone.—*Logan v. Barclay*, 3 Ala. 361; *Murphy v. Branch Bank*, 5 Ala. 421; *Jones v. Brooks*, 30 Ala. 588. The amendment in this case did not discontinue the action.—*Jones v. Englehardt*, 78 Ala. 505; *Whittaker v. Van Horn*, 43 Ala. 255; *Reynolds v. Simpkins*, 67 Ala. 378.

There was a demurrer to the petition in this case, which the court sustained; and the plaintiff declining to amend, judgment was given for the defendants. The first three grounds of the demurrer raise the questions: First, that the motion for summary judgment can not be maintained, because the term of office of Guyton, the principal, had not expired, he had not resigned, had not removed from the county, and had not been legally removed from office, when the alleged default was committed, nor when this proceeding was instituted. This line of the defense rests on the postulate, that the term of office referred to in this statute means the full term of two years for which he was appointed. These, it is contended, are the conditions—the only conditions—upon which this statutory remedy can be invoked. The legal principle is certainly unanswerable, if the statute means what it is claimed it does. 2 Brick. Dig. 464, § 6. We think, however, the construction contended for is too narrow. We think an officer's term of

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office expires at his death, as was held by this court in *Doe, ex dem. Saltonstall v. Riley*, 28 Ala. 164, 181. We hold the words of the statute, considered collectively, were intended to embrace every conceivable case where the office has become vacant by forfeiture, or by any event which produces that result. It was the fact that official functions had ceased, and not the means by which their termination was brought about, we think the legislature had in view.

The other question raised by the first three grounds of demurrer, grows out of the death of Guyton, the county superintendent, which rendered it impossible to join him as a defendant to the motion, or to obtain a judgment against him. The argument made in support of this line of defense is, that the statute, in express terms, requires such motion to be prosecuted against the delinquent officer, and that the clause in the statute, "or any of them," is confined to the sureties, and does not embrace the principal; in other words, that we should interpret the clause as if it said, against the principal and the sureties, or against the principal and any of the sureties.

In our first Code of laws—that of 1852,—chapter 3, Title 2, Part 3, was devoted to summary judgments. It was divided into six articles, commencing with section 2596 of that compilation. None of its provisions made any reference to defaulting county superintendents of education. In fact, our common-school system, as now organized, was then unknown. The first of those six articles was devoted to "General Rules" to be observed in such summary proceedings, and they were made applicable to each succeeding article in that chapter. The first article furnished the machinery—the only machinery—for administering the redress provided for in the remaining five articles. That chapter, with corresponding numbers, alike of chapter, title, and part, and with some additions, was carried into the Revised Code of 1867, commencing with section 3025. Article one still contained the General Rules, or machinery, and no other rules were given in that edition of our Code of laws. In *Ex parte Wilson*, 54 Ala. 396—decided at the December term, 1875—it was held by this court, that these "General Rules" applied to motions against tax-collectors, under article 5 of that chapter. The general rule, thus held applicable to proceedings against a defaulting tax-collector, has undergone no change since its first enactment. It is section 2597 in the Code of 1852, section 3026 in the Code of 1867, and section 3352 in the Code of 1876. Its language is: "The motion may be made by the party aggrieved, or his legal representative, against the person in default, and his sureties upon his official bond; and judgment must be rendered against such of the parties, whether principal or surety, as may have received



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notice of the intended motion.” This section authorizes the legal representative of the party aggrieved to be mover in such proceedings, but makes no provision for proceeding against the personal representative of the defaulting officer. It does authorize judgment to be rendered against such of the parties, whether principal or surety, as have received notice of the intended motion.

The act “To provide summary remedies against defaulters to the public school fund” (Sess. Acts, 1874-75, p. 173), was approved March 9, 1875. That was the first statute which provided a summary remedy for the defaults therein enumerated. The present proceeding is under section 1, subd. 3, of that act, now section 3397, subd. 3, of the Code of 1876. The Codifiers of 1876 incorporated this statute in their compilations, and made it article 6, of chapter 3, Title 2, Part 3; the chapter we have been considering. The legislature, by the adoption of the Code, must be supposed to have approved and adopted this collocation by the Codifiers. And the question arises, whether being thus made part of chapter 3, Title 2, Part 3 of the Code, proceedings under it are to be governed by section 3352, copied above. If so, the authority to proceed and obtain judgment against the parties, or any of them, must be interpreted with the added clause, “whether principal or surety.” Guyton being dead before the proceedings were commenced, and it being impossible to proceed against him, this interpretation would authorize a suit and recovery against the sureties, proceeded against alone.

If, however, this interpretation is not permissible, in what manner shall we interpret the act of 1875, considered separate and apart from the “General Rules” found in article 1, chap. 3, Tit. 2, Part 3 of the Code? That statute, it will be remembered, is embodied in the Code of 1876, sections 3397 to 3401, without material change. Section 3397, in providing for summary judgments on motion, gives the remedy it provides against the defaulters and the sureties on their official bonds, or any one of them. Subdivision 3 of this section, specially devoted to the character of default complained of in this case, authorizes suit and judgment against the county superintendent of education, and the sureties on his official bond, or any of them. To what antecedent do the words, “or any of them,” refer? Do they refer alone to the sureties, or equally to principal and sureties? We think the latter the better interpretation, for the following reasons: First, it gives a natural interpretation to the two clauses of the act of 1875, which we have quoted above, and gives effect to each clause; second, it produces a harmonious system in summary proceedings, provided for in the chapter of the Code we are considering, and

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which chapter was manifestly intended to cover most official defaults which are mere civil wrongs.

What we have said is not in conflict with the rulings in *Orr v. Duval*, 1 Ala. 262; *James v. Auld*, 9 Ala. 462; and *Collier v. Powell*, 23 Ala. 579. Those cases arose on statutes differently worded, and which expressly required notice to the defaulting officer.

There is nothing in the fourth ground of demurrer. In the absence of negative averment, we would, if necessary, presume the officers did their duty in the matter of filing a copy-bond in the office of the superintendant of education, and obtaining his approval thereof. We think, however, if this duty was omitted, it is no defense to the superintendent or his sureties. Code of 1876, § 181; *Sprowl v. Lawrence*, 33 Ala. 674; *Lewis v. Lee County*, 66 Ala. 480; *Steele v. Tutwiler*, 68 Ala. 107.

Reversed and remanded.

## Pitts v. District of Opelika.

### *Prosecution for Violation of Municipal Ordinance.*

1. *Waiver of demurrer.*—In a quasi criminal prosecution for the violation of a municipal ordinance, removed by appeal into the Circuit Court, if a demurrer is interposed to the statement (or complaint), and the plea of not guilty is afterwards filed, before any action of the court is had or invoked on the demurrer, this court will hold the demurrer to have been waived, and will not consider the sufficiency of the complaint as assailed by it.

2. *Publication of municipal ordinances.*—The statutory provision requiring the ordinances of municipal corporations to be published ten days before they become operative (Code, § 1785), applies only to those corporations which are organized under the general law of which that provision is a part, and not to municipalities created by special statute, or legislative act.

3. *Same.*—When the special statute creating a municipal corporation does not prescribe the length of time its ordinances shall be promulgated before they become operative, it is only necessary that there shall be a substantial compliance with the constitutional provision, that no person “shall be punished but by virtue of a law established and promulgated prior to the offense” (Art. I, § 8); which only requires that the promulgation shall be reasonably sufficient to accomplish the humane and just purpose for which it was enacted, as determined by the particular circumstances of each case.

4. *Same.*—In this case, the corporation called the “District of Opelika” being created by special statute (Sess. Acts 1882-83, p. 485), which does not prescribe the length of time its ordinances shall be promulgated before they become operative, this court can not affirm, as matter of law, that an ordinance is not of force seven days after its enactment.

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APPEAL from the Circuit Court of Lee.

Tried before the Hon. HENRY D. CLAYTON.

W. J. SAMFORD, for the appellant.

O. KYLE, Jr., *contra*.

CLOPTON, J.—The defendant was convicted before the Recorder, of a violation of an ordinance of the “District of Opelika,” from which he took an appeal to the Circuit Court. On the appeal, a complaint was filed, to which the defendant interposed a demurrer, but afterwards pleaded “not guilty,” without invoking or obtaining action of the court on the demurrer. This was a waiver of the demurrer, and the insufficiency or irregularity of the complaint is not properly presented for revision. The sole question arises on the refusal of the court to charge, at the request of defendant, that if the ordinance had been published for seven days only before the commission of the offense, it was not in force at that time, and that the defendant can not be convicted of its violation.

The statutory provision, that no by-law or ordinance must be enforced, until it has been published at least ten days in three public places in the town, and also in a newspaper, if any is published within the limits of the corporation, has reference to the by-laws and ordinances of towns incorporated under the general laws, and is not applicable to those of a town or city incorporated by a special act of the General Assembly.—Code, § 1785. If the charter prescribes no regulations or limitations, there is no general law applicable in such case, other than the constitutional prohibition, that “no person shall be punished but by virtue of a law, established and promulgated prior to the offense, and legally applied;” which is imposed on the legislative power, whether exercised by the legislature directly, or by the local municipal governments, their authority being only delegated. The constitution does not prescribe the mode and time of promulgation, but left these matters to the discretion and determination of the law-making power; the implied restriction being, that the promulgation shall be reasonably sufficient to accomplish the humane and just purpose of the constitution.

Neither the original act incorporating the “District of Opelika,” nor the amendatory act, prescribes any mode or time for publishing the ordinances.—Acts 1882–3, p. 585; Acts 1884–5, p. 512. The matter, therefore, is rested on the discretion of the municipal government; but not an arbitrary discretion. A reasonable opportunity must be given to the people within the corporate limits, to be informed as to the ordinances they are



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commanded to obey, before they can be punished for their violation. A promulgation that may be insufficient in one community, may be sufficient in another, differently circumstanced. Without showing what period of publication, if any, is prescribed by the municipal authorities, we are merely informed, that the ordinance in question was published seven days. The presumption is in favor of the reasonableness of the promulgation, which must prevail in the absence of proof of counter-vailing facts and circumstances. We can not affirm, as matter of law, that, on the facts disclosed by the record, the ordinance was not in force at the time of its violation by the defendant.

The judgment is affirmed.

## Roulston v. Washington.

### *Application for Sale of Decedent's Lands, for Equitable Division among Heirs.*

1. *Sale of decedent's lands, for equitable division; jurisdiction of court, when lands were owned by partnership.*—Under its statutory jurisdiction to order a sale of a decedent's lands, when the same can not be equitably divided among the heirs or devisees (Code, § 2449), the Probate Court has no power to order the sale of a deceased partner's interest in partnership lands, before the partnership debts have been paid, and the accounts between the partners settled and adjusted; and the fact that the surviving partner makes the application, as administrator of the estate of the deceased partner, does not affect the principle.

APPEAL from the Probate Court of Jackson.

Heard before the Hon. JOHN B. TALLY.

In the matter of the petition of James F. Washington, as administrator of the estate of William Washington, deceased, for an order to sell the decedent's interest in certain lands, on the ground that the same could "not be equitably divided among the heirs without a sale." The petition alleged that the lands belonged to the partnership of W. & J. F. Washington, which was composed of said decedent and said administrator, and which was dissolved by the death of said William Washington; and that the decedent owned an undivided one-half in the lands. James B. Roulston and his wife, she being one of the children and heirs of the decedent, contested the application, and filed an answer to the petition, alleging that the partnership accounts of W. & J. F. Washington had never been settled, and denying the jurisdiction of the court to order a sale as prayed. The court granted the order of sale as prayed, and

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this decree, to which the contestants duly excepted, is now assigned as error.

W. L. MARTIN, with R. C. BRICKELL, for the appellants, cited *Guilford v. Madden*, 48 Ala. 290; *Buchan v. Sumner*, 47 Amer. Dec. 305; *Brewer v. Brown*, 68 Ala. 210; *Baird v. Baird*, 31 Amer. Dec. 395.

J. E. BROWN, *contra*.

CLOPTON, J.—The statutes confer jurisdiction on the Probate Court to order a sale of the lands of an estate, when the same can not be equitably divided amongst the heirs or devisees, whether the estate be legal or equitable, and whether held in severalty or in common with others. When held in common, the sale and conveyance constitute the purchaser a tenant in common with the other tenants.—*Fielder v. Childs*, 73 Ala. 567. The jurisdiction of the court attaches on the filing of a proper petition. It does not attach, if the application fails to show that the decedent owned, at the time, either a legal or equitable estate in the lands, which, in its nature, is descendible to his heirs.—*Pettit v. Pettit*, 32 Ala. 288.

The application is for an order to sell an undivided half interest in the lands described, which, as appears from the petition, were conveyed to a partnership, of which the deceased was a member. The administrator is the surviving partner; and the evidence shows that the lands were paid for with partnership funds, except one thousand dollars, which were paid by the deceased partner individually. When a partnership is dissolved by the death of one of the partners, the legal title to the personal effects vests in the survivor, on whom devolve the right and the duty to settle the partnership affairs. As to the real estate purchased with the partnership funds, or taken in payment of a partnership debt, the legal title vested in the deceased partner descends to his heirs; but, as respects a settlement of the partnership debts and accounts, it possesses many of the incidents of personal property, and will be treated as such in equity, so far as it may be applied to such purpose. The surviving partner has an equitable interest in the real estate, which he may make available for the payment of the partnership debts, and to equalize the accounts between himself and the deceased partner. He has the right to dispose of the real estate, for the purposes of a settlement of the partnership, and his deed will convey an equity to the purchaser, who may call on the heir, and compel him to convey the legal title. When the partnership debts have been paid, and a settlement *interesse* had, the lands remaining are treated as real estate, and the

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partners as tenants in common.—*Espy v. Comer*, 76 Ala. 501; *Andrews v. Brown*, 21 Ala. 437; *Lang v. Waring*, 17 Ala. 145.

The design of the statute is to convert the land into money, either for the payment of debts, or for more equal distribution among the heirs. The estate or interest which the Probate Court has jurisdiction to order sold, under the comprehensive term, "*lands of an estate*," is an individual and separable estate or interest, whether legal or equitable, and though held in common with others, and the value of which is capable of ascertainment with reasonable certainty. On the rule, that the value of the estate or interest, though equitable, is as capable of ascertainment as if legal, is founded the jurisdiction of the court to order the sale of the equity of redemption of a deceased mortgagor, and the inchoate equity of a vendee, who has not paid the purchase-money, nor acquired the legal title. *Jennings v. Jenkins*, 9 Ala. 285. Unless the *quantum* and value of the estate are reasonably capable of ascertainment, a purchaser can not know what he is purchasing, and the court will be unable, on application for a confirmation of the sale, to determine whether the land sold for an amount not greatly less than its real value, as required by the statute.—Code, § 2467. A partner has no individual and separable claim, or right, to any particularized partnership assets, real or personal. His share of the partnership assets is incapable of legal ascertainment, until the payment of the partnership liabilities, the settlement of accounts, and the ascertainment of the *residuum*. If the *residuum* consists, in whole or in part, of real estate, the relation of partners is converted into a relation of tenants in common as to the real estate remaining. In *Brewer v. Brown*, 68 Ala. 210, the bill, which was for a partition of lands purchased with partnership effects, and conveyed to the partnership, was sustained, on the ground, "that all claim or right to have the lands treated as partnerships effects, and applied to partnership wants, is barred, and there is no longer any occasion or right, by bill or otherwise, to alter or disturb their *status* as real estate." The lands were accordingly treated as real estate, owned by the parties as tenants in common. If, however, the right to treat the lands as partnership effects, and to apply them to partnership wants, had not been barred, it is clear from the opinion delivered, that a partition would not have been decreed, without a settlement and adjustment of the partnership affairs. If, without such settlement, or without the lapse of the period of the bar, a partition of the partnership lands will not be made between the surviving partner and the heirs of the deceased partner, on what principle is the court authorized to order the sale of the deceased partner's interest, for distribution among his heirs, before the occasion and time



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when the land will be treated as real estate, held and owned by the parties as tenants in common?

Whilst the evidence of the surviving partner shows that all the partnership debts have been paid, it also appears that there has been no adjustment and settlement of the partnership accounts *inter sese*. The Probate Court is without jurisdiction to make such settlement, and therefore without power to execute the preliminary ascertainment of the estate or interest of the decedent which is sought to be sold. A court of chancery alone is competent for this purpose, and has authority, to the end of doing complete justice, to decree a sale of the lands. A sale of such undefined interest, being a sale of the legal title descended to the heirs, subject to the partnership wants and equities, would greatly prejudice the estate.

We are forced to the conclusion, that it was not the intention of the statute to confer on the Probate Court jurisdiction to order the sale of a deceased partner's interest in partnership lands, antecedent to an adjustment and settlement of the partnership accounts. It is no answer, that, in this case, the surviving partner is the administrator, and would probably be estopped from asserting any claim or equity against the purchaser. The question of jurisdiction to order a sale, in such case, must be determined as applicable to all similar cases, without respect to the person who may be the personal representative. If the court had jurisdiction, when the surviving partner, who alone has the means of ascertaining the true state of the partnership accounts, is also administrator, an order of sale should not be made until a settlement, so that all the parties would occupy equal vantage-ground.

Reversed, and an order here made dismissing the petition.

## Lehman, Durr & Co. v. Hudmon Brothers.

### *Garnishment on Judgment; Appeal from Justice's Court.*

1. *Appeal from justice's court; how tried.*—On appeal from a judgment rendered by a justice of the peace, his judgment is vacated, the case stand on the process and pleadings, and is triable *de novo* on the merits (Code, §§ 3121-22); and if the sum claimed exceeds twenty dollars, an issue must be made up under the direction of the court, and tried by a jury.

2. *Same; contesting garnishee's answer; tendering issue; judgment by default.*—When the answer of a garnishee, denying an indebtedness,

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is contested, and the issue is decided against him by the justice, from whose decision and judgment he takes an appeal; the case stands in the Circuit Court as if there had been no judicial action on the contest, and the plaintiff must tender an issue in writing; and such issue not being tendered, he can not claim a judgment by default.

APPEAL from the Circuit Court of Coosa. •

Tried before the Hon. H. D. CLAYTON.

The appellees in this case, suing as partners, commenced an action before a justice of the peace, on the 4th of August, 1883, against Lewis S. Driver, claiming \$100 due by promissory note; and judgment was rendered, by confession, on the same day. On the 13th November, 1883, plaintiffs sued out a garnishment on this judgment, against Lehman, Durr & Co., a mercantile partnership doing business in the city of Montgomery. The garnishment was duly served, and an answer was filed in the partnership name on the 1st December, denying any indebtedness or liability whatever; and on the same day an affidavit was made by plaintiffs' attorney, contesting the answer. The garnishees afterwards filed two pleas to the jurisdiction, to each of which a demurrer was sustained; and thereupon the justice rendered judgment, on the 5th January, 1884, as follows: "Plaintiffs demur to said pleas, and, after argument, it is considered that said demurrer is well taken, and the same is sustained. Plaintiffs release all interest on said judgment; and after hearing the evidence in the case, and the arguments of counsel, it is considered by the court, that the plaintiffs have and recover of the said garnishees, Lehman, Durr & Co., the sum of \$100, for which let execution issue." From this judgment the garnishees sued out an appeal to the Circuit Court; and in that court, on the 29th October, 1884, a judgment by default was rendered against them. This judgment recites the original judgment against Driver, the issue and service of the garnishment, the answer of the garnishees, its contest, and the decision against them; and then adds: "It is therefore considered by the court, that the plaintiffs have judgment for the amount of the indebtedness of said garnishees to said defendant; and because the sum of said indebtedness is uncertain," a writ of inquiry is ordered and executed, and judgment on verdict for \$100 rendered against the garnishees. The garnishees appealed from this judgment, and here assigned it as error.

RICE & WILEY, for appellants.

L. E. PARSONS, Jr., *contra*.

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the peace are triable *de novo*, upon their merits, without regard to the judgment of the justice. By the appeal, that judgment is vacated, and ceases to have any force or effect, either as an estoppel, or as matter of evidence. The judgment of the justice is not reversed or affirmed, but a new, distinct and independent judgment, as may be required by the merits shown on the trial, is rendered by the City or Circuit Court."—*Abraham v. Alford*, 64 Ala. 281; *Littleton v. Clayton*, 77 Ala. 571; Code of 1876, § 3121.

When this case was appealed from the justice's to the Circuit Court, the judgment of the justice was thereby vacated; and the case stood in the higher court on the process and pleadings, without judicial action upon them, precisely as it would have stood at that stage of the proceedings, if the case had been instituted in that court in the first instance. There was process of garnishment regularly sued out and served, answer of garnishees denying all indebtedness and liability, and the answer controverted by the oath of plaintiffs' attorney.—Code of 1876, §§ 3683, 3299. There was nothing more.

In the trial before the justice of the peace, the inquiry was, whether or not Lehman, Durr & Co. were indebted to Driver, or had in their possession, or under their control, property or things in action belonging to Driver. The judgment rendered by the justice shows, that indebtedness *vel non* was the inquiry. No formal issue raising that question was required to be joined before the justice.—*Condry v. Henley*, 4 S. & Por. 9; *Stockdale v. Riddle*, 22 Ala. 678. There was, in fact, no written issue made up before the justice. The rule was different, when the case reached the Circuit Court. The sum claimed being in excess of twenty dollars, it was to be tried "upon an issue to be made up under the direction of the court, and tried by a jury."—Code, § 3122. In forming an issue in this case, the plaintiffs were required to be the actors. On them rested the duty to "allege in what respect the answer [was] untrue." Code, § 3299. Till that allegation was made—and it should have been made in writing—no issue was tendered, and no cause of action was set forth. Till then, the garnishee might stand still, and do nothing. His answer was on file, denying all indebtedness and all liability, and no judgment could be rendered against him on that. True, it was controverted, but that neither made nor tendered an issue. It simply placed the plaintiffs in position where they could tender an issue. They were in no better condition than a plaintiff would be in, who had brought a defendant into court by summons or attachment, but had filed no complaint. They could claim no judgment, for they had set forth no claim to have a judgment.

In ordinary suits for money claimed to be due, the plaintiff



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files his complaint, setting forth his cause of action. A summons is then issued, accompanied with a copy of the complaint, which is served on the defendant. If the defendant fails to appear and defend, judgment by default is taken, with a writ of inquiry, if the suit be not on a writing ascertaining the sum due. Proceedings in garnishment are statutory, and wholly different. If there be an answer admitting indebtedness, judgment is entered on the answer. If the garnishee fails to answer, a conditional judgment may be claimed, and certain regulations are prescribed for having it made absolute. If the garnishee answers, denying indebtedness, the answer may be controverted, an issue formed, and the question of indebtedness *vel non* submitted to a jury. If the issue be determined in favor of the plaintiff in garnishment, judgment is then rendered against the garnishee, not necessarily for the amount he may be found indebted. That depends on the extent of the plaintiff's claim on his own individual debtor; for garnishment is a suit, not for the collection a debt due from the garnishee to the plaintiff. It asserts no such claim. It is a proceeding by which a debtor's dues are attached, and made liable to his debts. Garnishment is a species of attachment. Ordinary judgment by default, and writ of inquiry executed, are not adapted to its administration.

In a case circumstanced as this was, the first step for plaintiff to take was to file his suggestion, or complaint, alleging in what respect the answer was untrue. On this the garnishee could have joined issue, or he could, possibly, have made other defense. Whether he did or not, the *onus* was still on the plaintiff of making out his case; for the statute makes no provision for a judgment by default.

Reversed and remanded.

## Bolling v. Smith.

### *Statutory Action in nature of Ejectment.*

1. *Sale of decedent's lands, under probate decree; construction of petition.*—After the proceedings of the Probate Court, in the matter of an administrator's petition for an order to sell the lands of the decedent's estate, have ripened into an order of sale and sale made under it, a liberal construction will be placed on the allegations of the petition, in order to sustain the proceedings.

2. *Same, for equitable division; sufficiency of petition.*—An averment in the petition that the lands "can not be fairly, equally and beneficially divided among the heirs and distributees of said deceased, without a

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sale," being the equivalent of an averment that they can not be *equitably* divided without a sale (Code, § 2449), is sufficient to sustain the order of sale when collaterally attacked.

3. *Sale of lands for delinquent taxes; recitals and registration of deed to purchaser.*—The deed of the judge of probate, to the purchaser of lands sold for delinquent taxes, is *prima facie* evidence of the facts therein recited (Code, § 460), *only* when executed in substantial compliance with the requirements of the statute, and properly recorded.

4. *Same; limitation of action.*—The limitation of five years, prescribed as a bar to actions for the recovery of lands sold for delinquent taxes (Code, § 464), does not begin to run until the deed to the purchaser is properly recorded.

#### APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Samuel J. Bolling, against John A. Smith, to recover a tract of land containing 320 acres; and was commenced on the 12th April, 1882. The defendant pleaded not guilty, "and the statute of limitations of five years under a tax-deed;" and the cause was tried on issue joined on these pleas. It was proved on the trial, as appears from the bill of exceptions, that Augustus H. Thompson died seized and possessed of the land, in January, 1864; that on the petition of his administrator, J. W. Owens, the land was sold under an order and decree of the Probate Court, on the 25th November, 1880, the administrator himself becoming the purchaser; that the sale was reported to the court, duly confirmed, and a conveyance executed to the purchaser by a commissioner appointed by the court; and that said Owens, the purchaser, sold and conveyed to the plaintiff, by deed dated April 7, 1881. This was the plaintiff's claim of title. The defendant deduced title as follows: 1st, a deed from the judge of probate to J. W. Thompson, as the purchaser at a sale for delinquent taxes, which was dated November 24th, 1873; 2d, a deed from said J. W. Thompson to Mrs. A. M. Willis, which was also dated November 24th, 1873; and, 3d, a deed from Mrs. Willis (and others) to defendant, which was dated March 22d, 1879. It was proved that said J. W. Thompson, under whom the defendant claimed, was a brother of said Augustus H. Thompson, and one of the heirs and distributees of his estate. The deed of the probate judge to said J. W. Thompson recited that the land was subject to taxation for the year 1870, and was sold by the tax-collector, in May, 1871, "in substantial conformity with all the requisitions of the statute," for the non-payment of taxes, with penalties, interest, and costs; that said J. W. Thompson became the purchaser, at the sum due (\$16.25), which he paid to the collector; and that the property had not been redeemed within two years; but it did not recite to whom the land was assessed. This deed was duly acknowledged by the

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judge of probate, on the day of its date, before the clerk of the Circuit Court; but it was not recorded, until after the commencement of this suit. The plaintiff objected to the admission of said deed as evidence, (among other grounds) "because the same was not recorded until after commencement of this suit, and after plaintiff's right had attached." The court overruled the objection, and the plaintiff excepted. There were other objections to evidence, but they require no notice.

On this evidence, the court instructed the jury, at the instance of the defendant, "that although the tax-deed in evidence does not, of itself, divest the title out of the heirs of A. H. Thompson; yet, if the defendants held under it for five years before the bringing of this suit, openly, notoriously, and continuously, claiming it as their own, then the plaintiff is barred, and he can not recover." The plaintiff excepted to this charge, and requested several charges in writing, each of which asserted, in effect, that adverse possession under the tax-deed did not begin until the deed was duly recorded. The court refused each of these charges, and the plaintiff excepted to their refusal.

GAMBLE & RICHARDSON, for the appellant.—By the express terms of the statute (Code, § 460), a deed for lands sold for taxes is required, not only to be signed and acknowledged by the judge of probate in his official capacity, but also to be "recorded in the proper record of titles to real property;" and without this registration, it is insisted, the statute of limitations does not begin to run in favor of the grantee. On the question of adverse possession, see, also, *Bernstein v. Humes*, 60 Ala. 602; *McCall v. Pryor*, 17 Ala. 533; *Cox v. Davis*, 17 Ala. 714; 47 Ala. 637; 69 Ala. 598; *Pickett v. Pope*, 74 Ala. 131; *Baucum v. George*, 65 Ala. 259; *Hendon v. White*, 52 Ala. 597.

E. CRENSHAW, and L. M. LANE, *contra*.—The charges given, as to the statute of limitations, assert correct propositions which are directly applicable to the facts in evidence.—*Pugh v. Youngblood*, 69 Ala. 296; *Jones v. Randle*, 68 Ala. 258; *Hall v. Root*, 19 Ala. 378; *Ludd v. Dubroca*, 61 Ala. 25; *Mills v. Clayton*, 73 Ala. 359; *Bell v. Denson*, 56 Ala. 444. If error was committed in any of the rulings against the plaintiff, it was error without injury, since he showed no title; the sale under the probate decree being void, because the administrator's petition does not state or show a statutory ground of sale.—*Robertson v. Bradford*, 70 Ala. 387.

CLOPTON, J.—The application of the personal representa-



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tive to the Court of Probate, for an order to sell the lands of the estate of Augustus Thompson, on which the plaintiff's title rests, contains the allegation, "that said lands can not be fairly, equally and beneficially divided among the heirs and distributees of said deceased, without a sale thereof." After the proceedings in the Probate Court have passed the domain of pleading, and ripened into a decree and sale, a liberal construction will be given to the petition, and every intendment in favor of its sufficiency made for the maintenance of the validity of the sale.—*King v. Kent*, 29 Ala. 542; *Pollard v. Hanrick*, 74 Ala. 334; *Whitlow v. Echols*, 78 Ala. 206. The allegations of the petition, although not in verbal conformity with the statute, are of equivalent import, and sufficient on a collateral attack. *Satcher v. Satcher*, 41 Ala. 26. Jurisdiction having attached by the filing of a sufficient application, subsequent errors and irregularities can not affect the validity of the sale.

The deed of the judge of probate, to lands sold for the non-payment of taxes, to the purchaser on default of redemption, if substantially executed as required by the statute, and *recorded in the proper record of titles to real property*, is *prima facie* evidence of the facts recited therein, in all the courts of this State, in all controversies and suits in relation to the rights of the purchaser, his heirs, or assigns, to the lands thereby conveyed.—Acts of Ala. 1868, § 87; Code of 1876, § 460; Acts of Ala. 1884–85, 59. The statute is in abrogation of the common-law rules of evidence, and compliance with its requisitions is preliminary and necessary to the competency of the deed. Substantial execution in accordance with the provisions of the statute, and registration in the proper record of titles, are essential to the admissibility of the conveyance, as evidence of its recitals. The bill of exceptions, which purports to set out all the evidence, does not disclose any proof of the record of the deed in the proper record of titles. In the absence of such evidence, or of proof *aliunde* of the sale, the deed is not admissible; and its recitals, in such case, are not *prima facie* evidence of the sale of the lands for taxes.

In *Jones v. Randle*, 68 Ala. 258, we held, the statutory bar to actions for the recovery of real property sold for taxes does not begin to run prior to the time the deed is executed by the judge of probate to the purchaser. The contestation was, whether the statute commenced to run from the time of the sale by the tax-collector. In *Lee v. Lassiter*, 68 Ala. 287, the question was, whether, the sale being void, this would preclude or stop the running of the statute of limitations, and it was held it would not. The deed had been recorded. In *Pugh v. Youngblood*, 69 Ala. 296, it was held that, although a conveyance of lands sold for the non-payment of taxes may not recite

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facts which would support the sale, it constitutes color of title, and adverse possession under it, for the period prescribed by the statute, will bar the entry of the true owner. In *Mills & Hooper v. Clayton*, 73 Ala. 359, it was held, if the purchaser takes possession under a tax-deed, or, having previously taken possession, he continues his possession under such deed, the statute of limitations is put in motion in his favor, from the date of his possession under the deed. In neither of these cases was any question made on the necessity of the record of the deed, and the cases must be restricted to the questions raised in each case. The rule on which each case rests is, that the statute commences running from the final, consummating act of sale; and the rule deduced from them is, that the statute commences running from the date, when, no matter by whom the action may be brought,—whether by the purchaser, or the original owner,—an inquiry can be legitimately and properly made as to the validity of the sale. The design of the statute is to allow, as the period for testing the validity of the sale, five years, and five years only, from the time a judicial inquiry can be had. The pivotal question, as to the commencement of the operation of the statute—the determinant time—is, when was adverse possession taken, or continued, under a deed of the judge of probate, which authorizes an inquiry into the validity of the sale, in a suit for the recovery of the land, whether brought by the purchaser, or the original owner.

Section 87 of the revenue law of 1868, as embodied in section 460 of the Code, provides, that the deed shall be signed by the probate judge in his official capacity, and acknowledged by him before some officer, authorized to take acknowledgments of deeds; and when substantially thus executed, and *recorded in the proper record of titles to real property*, shall vest in the purchaser all the right, interest, and estate of the former owner, in and to the land conveyed. The title and estate of the original owner are divested, and passed to another, by statutory proceedings merely; and to have this operation, they must strictly conform to the provisions of the statute. The statute is, also, in part enabling, providing a mode by which the purchaser may complete his title—"recorded in the proper record of titles to real property." The certificate of purchase is assignable, and until there is a record of the deed, no means are furnished, by which the original owner may certainly ascertain the adversary claimant. Whatever may have been the reasons, it suffices, that the legislature deemed it more protective of rights, to make the passing of the title and estate of the former owner dependent on the record of the deed, following its substantial execution. As no title was, or could have vested, until the deed was recorded, the statute of limitations of five years

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could not commence to run prior to its record, in favor of, or against the purchaser. Our statute is, in this respect, a substantial copy of the Iowa statute; in construing which, it was said, in *Eldridge v. Knehl*, 27 Iowa, 160, which is cited approvingly, and followed in *Jones v. Randle*, *supra*: "Under our statute, the title does not vest in the purchaser, until the deed be 'executed and recorded in the proper record of titles.' When that is done, and not till then, will the statute begin to run. In other words, we hold that 'five years from the day of sale' means a *completed sale*, which vests the title in the purchaser."

The charges of the court, on the statute of limitations, are in conflict with these views.

It may not be improper to remark, that the revenue law of 1884-85 makes a different provision as to the time when the statute commences to run, which we have not considered, as this case is not governed by its provisions.

Reversed and remanded.

## Vincent v. Martin.

### *Bill in Equity for Settlement of Partnership and Administration Accounts.*

1. *Equitable relief against probate decree, in matter of settlement of administrator's accounts.*—A bill which seeks equitable relief against a probate decree on final settlement of an administrator's accounts, on the ground of alleged errors of law and fact, must negative all fault or negligence on the part of the complainant.

2. *Jurisdiction of Probate Court, when administrator occupies antagonistic positions.*—When the surviving partner becomes, jointly with another person, administrator of the estate of his deceased partner, he can not make a settlement of the partnership accounts in the Probate Court, in connection with the settlement of the administration; that court having no jurisdiction of partnership matters, nor of a settlement made by the administrator with himself in such dual capacity.

3. *Settlement of partnership accounts by survivor.*—When the surviving partner, having become administrator of the estate of the deceased, makes a settlement of the partnership accounts with the widow, represented by an attorney who has been appointed guardian *ad litem* for the infant distributees; such settlement is not binding on the estate, and is no bar to a bill in equity to compel a settlement.

4. *Continuation of partnership, under articles, after death of one partner.*—A stipulation in articles of partnership, that if either of the partners should die before the expiration of the stipulated period, "the surviving partner shall continue the business for the unexpired term," gives the survivor the power to employ all the partnership effects,



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without material change in the business, for the residue of the term; but confers on him no authority to fasten any new debt or liability on the estate of the deceased partner.

APPEAL from the Chancery Court of Shelby.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed by Mrs. Georgia A. Vincent, as administratrix *de bonis non* of the estate of her deceased husband, David T. Vincent, against Thomas J. Martin and John M. Kidd, the administrators in chief; and sought, principally, to compel a settlement by said Martin, as the surviving partner, of the partnership accounts of the late firm of T. J. Martin & Co., which was composed of him and said David T. Vincent; and also to correct alleged errors and mistakes in the final settlement of said administrators' accounts by the Probate Court, which was partly based on a prior voluntary settlement of the partnership accounts between said Martin and the complainant, before her appointment as administratrix *de bonis non*.

The partnership of T. J. Martin & Co. was formed in April, 1871, for the purpose of carrying on a mercantile business at Harpersville in said county, and was to continue for three years, as specified in the articles of agreement; but there was another stipulation, which is copied in the opinion of the court, providing for a continuation of the business by the survivor, on the death of either partner, for and during the unexpired portion of the term. Vincent died on or about the 1st October, 1871, intestate, and leaving a widow and two minor children; and letters of administration on his estate were granted, on the 8th November, 1871, to said Martin and Kidd, who gave bond, and entered on the duties of the administration. The bill alleged that Martin continued to carry on the partnership business as before, "until March 12th, 1872, when, without any cause, he pretended to dissolve the same, by taking an account of the stock on hand, carrying on the business afterwards in his own name, and appropriating the profits to his own use." On the 12th April, 1875, said Martin and Kidd made a partial settlement of their administration, with the Probate Court of said county, in which they charged themselves with assets received amounting to \$2,351.49, and asked credits for moneys paid out amounting to \$4,526.63, showing a balance of \$2,176.20 in their favor; but, in this settlement, the bill alleged, "said administrators did not charge themselves with any part of said Vincent's interest in said partnership, and a large portion of the payments made by them on account of the individual indebtedness of said Vincent was made more than two years after his death." On the 3d November, 1875, said administrators resigned, and filed their accounts and vouchers for a final settlement; and the 13th December was

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appointed for the settlement. In anticipation of this settlement, the complainant employed an attorney, who had been appointed guardian *ad litem* for the infants on the final settlement of the administrators' accounts, to effect for her a settlement of the partnership accounts with said Martin; and this settlement was made, a copy of it being annexed to the bill as an exhibit; but, as copied into the transcript, it does not show what balance, if any, was struck between the parties. On final settlement of the administrators' accounts, as shown by the decree, they were charged with assets received amounting to \$4,620.67, and allowed credits amounting to \$2,635.71, leaving a balance of \$1,984.96 in their hands for distribution; and decrees were thereupon rendered in favor of Mrs. Vincent, who was represented by an attorney, and the two minor children, represented by guardian *ad litem*, for \$661.65 each.

Letters of administration *de bonis non* on said Vincent's estate were granted to the complainant on the 25th December, 1875; and she filed this bill on the 20th July, 1877, specifying numerous errors, omissions and mistakes in each of said settlements, and praying relief as follows: "Oratrix prays that this hon. court will make a decretal order of reference to the register, directing him to take and state an account between oratrix and said T. J. Martin as the surviving partner of said firm, charging him with all such legal and proper items as were not included in said former settlement; and that an account be taken and stated between oratrix, as the administratrix *de bonis non* of said Vincent's estate, and said Martin and Kidd, former administrators thereof; that said Martin and Kidd be charged, in said account, with the balance due from said partnership to said Vincent's estate, and with all such other charges as may be shown to be necessary to render their said final settlement of their administration a correct one; that on final hearing a decree may be rendered correcting said final settlement of said Martin and Kidd, by requiring them, within a short time to be therein specified, to pay to oratrix the amount shown by said accounts to be due her as such administratrix;" and for other and further relief, under the general prayer.

A demurrer to the bill was filed by each of the defendants, assigning the following as grounds of demurrer: 1st, that the bill was multifarious, in seeking a settlement of the partnership accounts and also of the administration accounts; 2d, that Kidd had no interest in the settlement of the partnership accounts; 3d, that complainant was not entitled to relief against the settlement of the administration accounts, because she did not negative fault or negligence on her part in connection with that settlement, at which she was represented by counsel. The demurrer was overruled by Chancellor GRAHAM; but, on final

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hearing, on pleadings and proof, Chancellor COBBS dismissed the bill, and his decree is here assigned as error.

JNO. T. HEFLIN, for the appellant.

COBB & WILSON, *contra*.

STONE, C. J.—So far as the present bill seeks to review the final decree of the Probate Court, for alleged errors of law and fact committed in the probate settlement, both the pleadings and proof fail to make a case for relief. If any errors were committed in the settlement, there is an entire failure to show they were “without any fault or neglect” of the distributees, as this court has uniformly interpreted those words. Code of 1876, § 3837; *Humphreys v. Burleson*, 72 Ala. 1; *Lynn v. Wann*, *Ib.* 43; *Stoudenmire v. DeBardelaben*, *Ib.* 300; *Cawthorn v. Jones*, 73 Ala. 82; *Massey v. Modawell*, *Ib.* 421; *Boswell v. Townsend*, 57 Ala. 308; *Bowden v. Perdue*, 59 Ala. 409; *Otis v. Dargan*, 53 Ala. 178.

Martin and Vincent, the intestate, were mercantile partners at the time the latter died. Martin, with another, became administrator of his estate. Vincent left a widow and two infant children, his distributees. The latter were without guardians, so far as we are informed. When Martin and his co-administrator, Kidd, filed their account-current for final settlement of the administration in the Probate Court, and when they assembled for the purpose of making the settlement, there had been no settlement of the partnership accounts. Martin, being surviving partner, and administrator of his deceased co-partner's estate, could not settle with himself; and the settlement of partnership accounts *inter se* being without the jurisdiction of the Probate Court, that preliminary step in the administration settlement could not be taken in that court. 1 Brick. Dig. 440, §§ 182, 183, 188; *Hays v. Cockrell*, 41 Ala. 75; *Carswell v. Spencer*, 44 Ala. 204; *Tankersly v. Pettis*, 61 Ala. 354; 5 Wait's Ac. & Def. 149. In *Foster v. Wilber*, 1 Paige, 537, 542, it was said by Chancellor WALWORTH, “It would seem that, in such a case, the Court of Chancery alone was competent to make a decree settling all these conflicting rights, so as to do justice between the parties.” There was no attempt to settle the partnership account in the Probate Court, in this case.

Before the probate settlement was entered upon, some steps were taken with a view to settlement of the partnership account. Martin represented himself, and Mrs. Vincent was represented by counsel, and by a relative and friend, said to be a good accountant. Her counsel had also been appointed guardian *ad*



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*litem* for the infant children, to represent them in the probate settlement. As such guardian *ad litem*, however, he had no authority to represent them in the settlement of the partnership dealings, and, being without guardians, they could not have an attorney. The form of a settlement of the partnership transactions seems to have been gone through with, and the testimony tends to show it was, at the time, satisfactory to the attorney, and to the friend of Mrs. Vincent. It was not, however, a binding settlement, because Martin could not settle with himself, and because no one was authorized to bind the estate of Vincent, nor to represent the interests of the infant distributees.

We will not say that, if another had been Vincent's administrator, Martin could not have settled with him, without invoking the powers of the Chancery Court. Nor need we decide what would have been the result, if the infant distributees had been represented by a legally appointed guardian of their estates. What we do decide is, that Martin, by reason of the dual relation in which he was placed, could make no binding or legal settlement with himself, and the partnership accounts must be regarded as unsettled.

It is contended by the appellant, that by the terms of the articles of partnership, the death of Mr. Vincent worked no dissolution, but that the firm continued for three years from its formation, April 1, 1871. The language of the article of partnership, on which this argument is rested, is as follows: "It is further agreed, that if either of the parties should die before the expiration of said time, the surviving partner shall continue the business for the unexpired term of three years."

It may admit of grave question, whether, in strict language, a partnership can be continued in identity after the death of one of its members. Parsons gives it as his opinion that it can not, and his reasons for this opinion are difficult to answer. Pars. on Partnership, \*438, \*439, \*452, and notes. Even if there be a provision authorizing such continuance, this necessarily works some change in the *personnel*, for a dead man can neither make nor enforce contracts. Hence, if the direction be that the personal representative, or some member of the family of the partner so dying, shall take his place and continue the business, this, it would seem, could scarcely be called a continuation of the old firm, but the formation of a new one, as its successor. And certainly the person designated or appointed to take the place of the partner dying, could not, without his consent, be compelled to accept the position, and assume its cares and responsibilities. Would not this constitute it rather a new firm, than a continuation of the old one? Consult, in

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this connection, *Knapp v. McBride*, 7 Ala. 19, 28, and authorities cited; 5 Wait's Ac. & Def. 137, and references.

It is clear, however, that partners can make a valid and binding agreement, that in the event of the death of one or more of the members of the firm, the business shall be continued by the survivor, employing for the purpose the united capital which had constituted the partnership effects. That is precisely what we think the contract of partnership in this case contemplated. The result of such agreement and direction is, that the survivor can fasten no new debt or liability on the estate of the deceased partner, not previously carried into the adventure as part of the stock. He can only use and employ the partnership effects, as they were in the firm when his co-partner died. Over these, however, his control is unlimited, so long as he acts in good faith, with proper diligence and discretion, and does not depart materially from the line of business in which the partnership had been engaged.—*Ex parte Richardson*, 3 Madd. Rep. 138; *Garland*, *Ex parte*, 10 Ves. 110; *Catbush v. Catbush*, 1 Beav. 184.

After the settlement of their administration by Martin and Kidd, Mrs. Vincent was appointed administratrix of Vincent's estate, and in due time filed this bill in her representative character. We have seen that, as a bill to correct errors of law and fact in the administration settlement proper, it is without equity. It follows, that Kidd was improperly made a party to this suit. The bill should be so amended as to strike out his name; and this should be at the costs of the complainant. As a bill to secure a settlement of the partnership accounts, including a continuation of the business for three years, commencing April 1, 1871, complainant is entitled to relief, and the chancellor will order an account to be taken on the principles declared above. Martin will receive a credit so far as he has accounted for partnership effects.

Reversed and remanded.

## Jones & Co. v. Brewer.

*Action on Common Counts, for Price of Machinery Sold.*

1. *Sale of manufactured article; when property passes to purchaser.* Under a contract for the sale and purchase of a manufactured article, the property does not pass to the purchaser by his order to the manufacturer and its acceptance: there must be the selection and appropriation

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of one particular article, and facts showing an intention to pass the title or property to the purchaser.

2. *Same.*—When the manufacturer, on receipt of the order, selects a particular article, and forwards it by railroad, as directed, taking the bill of lading in his own name, attaching to it the draft for the price, and indorsing it to the freight agent at the place of destination, with instructions to “deliver to bearer;” these facts show an intention to retain the title until payment, and a loss by accidental fire at the railroad depot falls on the seller.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This action was brought by E. H. Jones, against W. P. Brewer, to recover \$208, the price of a mortiser sold by plaintiff to defendant; and was commenced on the 19th February, 1885. The plaintiff was a manufacturer of machinery, doing business at Cleveland, Ohio, under the name of E. H. Jones & Co. The negotiations between the parties were conducted through the mails. The defendant wrote from Birmingham, October 14th, 1884, as follows: “If I understand your prices for Smith’s new-style mortiser, you say \$208 for the same, with boring attachment, rack, and pinion-feed—that is, the machine complete as the cut shows it, with above attachments, all for \$208 cash. If this is right, please ship at once.” The plaintiff answered this letter on the 17th October, acknowledging the receipt of the order, stating the price as “*F. O. B. factory, for \$208,*” and promising prompt attention; and wrote again on the 30th October, stating that the mortiser had been shipped, and that he had drawn a sight draft for \$208, the agreed price. The mortiser arrived at Birmingham, at what time does not appear, and was destroyed by the fire which burned the railroad depot, on the night of 14th November, 1884. The defendant testified that he never received the plaintiff’s letter of October 30th; that he did not know the mortiser had been sent, until he found in the ruins at the depot, after the fire, remnants of a machine which looked like it; and that he had made inquiries at the depot for it several times before the fire. The letters “*F. O. B. factory,*” the plaintiff testified, meant *Free on board of cars at factory.*

On this evidence, the plaintiff requested the following charges to the jury: (1.) “If the jury believe, from the evidence, that the plaintiff delivered the machine, with attachments, at the place agreed on in the contract, then the risk of loss or injury to the property immediately vested in the defendant, and the plaintiff would be entitled to recover.” (2.) “If the jury believe, from the evidence, that the plaintiff complied with his part of the contract, and delivered the machinery at the place specified in the contract, then the property, and risks of accident to it, vested in the defendant, and the plaintiff



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would be entitled to recover." (3.) "The mailing of the letter to Brewer, notifying him of the shipment, is sufficient notice of the shipment, and it is not necessary that the letter should be received." (4.) "If the jury believe the evidence, they must find for the plaintiff." The court refused each of these charges, and the plaintiff excepted to their refusal; and he now assigns their refusal as error, together with several charges given at the instance of the defendant, and rulings on evidence.

MOUNTJOY & TOMLINSON, and C. A. SENN, for the appellant, cited Benjamin on Sales, §§ 319, 579, 587; *Pilgreen v. The State*, 71 Ala. 368; 6 Wheat. 104; 6 Mass. 316; 1 Pick. 401; *Sampson v. Lindsay*, 6 Porter, 123; Wade on Notice, 882.

MCADORY & GILLESPIE, *contra*.

CLOPTON, J.—The single question presented by the facts of this case is, on whom, by the terms of the contract, and the dealings between the parties, falls the loss of the mortiser? Generally, "the common law fixes the risk where the title resides." The decisive inquiry is, in whom was the property at the time of its destruction by the burning of the depot in Birmingham, on the night of November 14th, 1884? The general rule may be conceded, that a contract of sale of personal property in the possession of the vendor is complete when the terms are agreed on, and there remains nothing for the seller to do, though possession may not be given, and the buyer may not be entitled to it until the price is paid. The property immediately passes to the vendee, and on him is cast the risk of loss, arising from any cause, other than the fault or negligence of the seller. The order of the defendant was to ship to Birmingham, at a named price, a mortiser of a designated manufacture, with the attachments. The selection of the particular mortiser to be shipped was left to the plaintiff. Until a specific machine, with the attachments, is selected from others of the same description, and unconditionally appropriated to the fulfillment of the contract, the sale is not executed, and no property passes. There is not the concurring assent of the contracting parties to the sale of specified property. The risk of loss of any one, or of all such machines in the possession of the plaintiff, prior to such selection and appropriation, rests on him. The order and its acceptance do not, by themselves, constitute a complete sale. Unless a particularized mortiser is agreed on, to which the contract attaches, the parties only intend an executory agreement. *Block Bros. v. Maas & Block*, 65 Ala. 211. But, even in such case, a selection and appropriation will not pass the property,

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if it is the intention of the seller notwithstanding to retain the ownership.

Did the subsequent selection and shipping of the specific mortiser and attachments operate to pass the title and ownership to the defendant before their loss, so as to cast on him the risk? If such is the operation, the plaintiff is entitled to recover; if not, the judgment rendered is correct. The question is one of intention, to be ascertained by the general rule established for the purpose of determining whether or not the property has passed. The plaintiff resided at Cleveland, Ohio, and the defendant at Birmingham, in this State. The negotiation was conducted by correspondence through the mail. The price was to be paid on delivery. In contracts between parties residing at a distance from each other, sometimes the general property is considered as passing to the buyer, so as to make him liable for the payment of the price, and to impose upon him the risk of loss, while a special property is in the seller for his security in case of non-payment.—1 Benj. on Sales, § 319. When the vendor appropriates the goods, and puts them in course of transportation, by delivery to a carrier designated by the buyer, or by shipping them as directed, consigned to him, but to be delivered on payment of the price, it may be regarded as proof of an intention to transfer the general property, and the mere retention of a vendor's lien,—protection against the insolvency or default of the buyer.—*Mer. Nat. Bank v. Bangs*, 102 Mass. 291. The case of *Pilgreen v. The State*, 71 Ala. 368, falls within this class of contracts. The defendant, who was a dealer at Calera, was requested by the buyer to send him, at Columbiana, a half-gallon of whiskey, marked *C. O. D.* The Southern Express Company was the carrier selected by the buyer, and was his agent to receive the whiskey, and the agent of the seller to receive the price. It is said: "The general property, however, passed to the buyer by the delivery to the express company at Calera; the risk of loss then passed to him; though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property, and to the actual possession." The present case is not of this character.

While the plaintiff made selection and appropriation of the particular mortiser and attachments, and put them on board the cars, free of charge, in course of transportation to the place of destination, the bill of lading was taken from the railroad company in his own name, and the property was consigned to himself at Birmingham. A sight draft was drawn on the defendant, against the bill of lading attached, upon which is an indorsement, signed by plaintiff, as follows: "Freight Agent, at Birmingham, Ala., please deliver to bearer, on presentation,

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Oct. 30, 1884." The indorsement is not to the defendant, but is of a character to authorize any person, who is the bearer, and to whom the plaintiff may deliver it, to receive the property. By taking the carrier's receipt in his own name, and putting such indorsement thereon, the plaintiff clearly manifested an intention to preserve the title to the property,—as has been said, is "nearly conclusive evidence that he did not intend to pass the property to the defendant." In the absence of countervailing testimony, the *jus disponendi* is effectually retained. In *Dows v. Nat. Exchange Bank*, 91 U. S. 618, it was said, that such is the legal effect of a bill of lading taken deliverable to the shipper's own order, and that it is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, even when the shipment has been made in the vessel of the drawee of the drafts against the cargo, has been repeatedly decided; and that the inference was almost conclusive. In *McCormick & Richardson v. Joseph & Anderson*, 77 Ala. 236, it is said: "Here, the bill of lading taken from the railroad company by the shippers was made out to their order; and this operated, very clearly, to retain the title in themselves, by indicating an intention that it should not pass to the consignee, without an assignment of this 'document of title,' as it is often denominated." The same rule of construction has been asserted in numerous cases.—*The St. Jose Indiana*, 1 Wheat. 208; *White v. Baker*, 2 Ex. 1; 1 Benj. on Sales, §§ 541, 590.

This inference, arising from the bill of lading, is not rebutted by the stipulation of the contract, that the mortiser was to be put free on board. On a contract for the purchase of potatoes to be delivered *free on board*, part of the price paid in earnest of the bargain, and the balance in cash against bill of lading, where the potatoes were shipped in the purchaser's *own sacks*, under a bill of lading which made them deliverable to the vendor's order, it was held, that the retention by the vendor, in his agent's hands, of the bill of lading in the form in which it was taken, was effectual to reserve the *jus disponendi*; and that the right so reserved was not merely a vendor's lien, but involved the right to dispose of the goods by sale or otherwise, so long, at least, as the buyer remained in default.—*Ogg v. Shuter*, 1 C. P. Div. 47; 1 Benj. on Sales, § 562. Conceding that the defendant was notified by letter of the shipment of the mortiser, such notice did not operate to transfer the property. The letter is not evidence of title, and did not authorize the defendant to receive the goods consigned to the plaintiff.—*Dows v. Nat. Ex. Bank*, *supra*.

The draft for the price was drawn payable to the order of G. A. Garretson, cashier, and, with the bill of lading, taken and



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indorsed as stated, was deposited October 31, 1884, in the Bank of Commerce of Cleveland, Ohio, of which bank Garretson is the cashier. No further account is given of the draft, except that it was returned to the bank, unpaid, November 28, 1884, fourteen days after the loss of the property. It is not shown when it was forwarded to Birmingham, nor when it was protested, nor when presented to defendant; though the defendant testified, that he did not know that his order had been filled, or that the mortiser had been shipped, until he discovered the remnants in the ruins of the fire. The plaintiff has failed to show that the property passed to the defendant before its destruction.

There are no circumstances disclosed by the record to rebut the intention to retain ownership, evidenced by the bill of lading and the indorsement thereon. There is nothing in the evidence tending to show any other intent, and there was no inference to be submitted to the jury. On the evidence admitted, and if that excluded had been admitted, the court would have been justified in giving the affirmative charge in favor of the defendant. When such is the state of the case, erroneous rulings or instructions of the court will not work a reversal. *Block v. Maas, supra.*

Affirmed.

## Marks v. First National Bank.

### *Action on Note, by Payee against Indorser.*

1. *Accommodation indorser.*—An accommodation indorser of a note is liable to the holder, who has taken the note for value, before maturity, in good faith, and without notice of any fraud or equity which would vitiate it, precisely as if he had received value for his indorsement; and the fact that the holder knew, when he took the note, that the indorsement was for accommodation only, does not affect the principle.

2. *Same; taking note in payment of antecedent debt.*—When a creditor takes the note of his debtor, with accommodation indorsements, in payment of an antecedent debt, he is a purchaser for value, in due course of business, equally as if he had advanced money on the faith of it; but the rule is different when such note is taken as collateral security for an antecedent debt.

3. *Same; indorsement before negotiation.*—When a person indorses a note in blank, for the accommodation of the maker, to be used in payment of an antecedent debt due to the payee, he is liable to the payee as an indorser, although the note was never put in circulation by the payee.

4. *Same; fraud of maker as defense.*—If the accommodation indorse-

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ment is procured by the fraud of the maker, in concealing a condition annexed to a prior indorsement, the payee not having knowledge or notice of such fraud when he accepts the note as payment, such fraud is no defense to the accommodation indorser.

5. *Conditional indorsements and signatures as sureties; difference between bonds and commercial paper.*—The principle which governs the liability of sureties on bonds conditionally delivered, as asserted in *Guild v. Thomas* (54 Ala. 414), and *Bibb v. Reid* (3 Ala. 88), has no application to commercial paper, in the hands of an innocent purchaser, who acquired it before maturity.

6. *Declarations of bank officer, while negotiating note; admissibility against accommodation indorser.*—The declaration of the cashier of the plaintiff bank, while negotiating with a debtor for the acceptance of his note, with accommodation indorsements, in payment of an existing debt, to the effect that the note would not be accepted without the indorsements of the defendant and another person, are admissible as evidence against the defendant, who afterwards indorsed the note while in the hands of the bank.

## APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This action was brought by the First National Bank of Montgomery, against Samuel B. Marks, Jr., and was founded on two promissory notes, one for \$1,600, and the other for \$1,680; each of which was signed by W. C. Fellows as maker, payable to the order of the First National Bank of Montgomery, at its banking-house in the city of Montgomery, and indorsed by N. H. R. Dawson, J. B. Gaston, and the defendant, Samuel B. Marks, Jr. The note for \$1,600 was dated at Selma, July 17th, 1882, and payable on the 1st January, 1884; and the defendant's name appeared on the back as the second indorser, being written between the names of Dawson and Gaston. The note for \$1,680 was dated at Montgomery, January 4th, 1883, and payable on the 1st July, 1883; and the defendant's name appeared on the back as the third indorser, being written below the names of both Dawson and Gaston. The last note had been given in renewal and extension of a former note for \$1,600, which was dated at Selma, July 17th, 1882, and payable on the 1st January, 1883; and on which the parties' names appeared in the same order as on the new note. Each of said notes was duly protested for non-payment. The complaint contained four counts, two on each note; the first declaring against the defendant as a maker of the note, with Fellows, Dawson and Gaston, and the second as indorser of a note made by Fellows. The defendant pleaded, in short by consent, *non assumpsit*, and want of consideration; and he also filed a special plea, which averred, in substance, that his indorsement was made without consideration, and solely for the accommodation of said W. C. Fellows, and was procured by the fraud of said Fellows, in concealing from him the fact, of which he was ignorant at the time, that the indorsement of said Dawson

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was not, as it appeared on the back of said notes, that of a first indorser, who would be liable as such to subsequent indorsers, but was made subject to the condition that two other persons should become bound as co-sureties equally with him, and that the notes were delivered to the bank by said Fellows in violation of this condition. Issue was joined on all of these pleas.

The following are the material facts of the case, as shown by the bill of exceptions, which purports to set out all the evidence introduced on the trial: W. C. Fellows was engaged in the city of Montgomery, in partnership with one Graham, in the business of buying and selling cotton; and at the close of the summer season in 1882, their partnership was indebted to the plaintiff bank, in the sum of about \$6,400. Graham assumed and settled one-half of this indebtedness, and Fellows undertook to settle the other half, in anticipation of making new business arrangements for the next season; the bank agreeing to settle and extend the debt, at a low rate of interest, on good security being given. At that time, Fellows was negotiating with the defendant and Bernard Gaston, a son of J. B. Gaston, for the formation of a partnership between them in the business of buying and selling cotton; and a partnership was consummated between them, under written articles dated August 1st, 1882. Fellows went to Selma, where Dawson resided, and procured his indorsement in blank of the two notes for \$1,600 each; but this indorsement was made, as Fellows and Dawson each testified, on the express condition, that the notes should not be used until Fellows had procured the indorsement of two other solvent persons, who should be bound jointly and equally with Dawson as co-sureties. Dawson testified, also, "that when Fellows applied to him to indorse said notes, and when he indorsed them, he was not aware that Fellows intended to use them in paying an old debt to the bank, nor that Fellows was indebted to the bank at all; but that Fellows said he wanted to use these notes to make necessary arrangements with the bank to enable him to carry on the business he was about to engage in with defendant (Marks) and young Gaston." Fellows took the note to the bank, and stated to Dr. Baldwin, the president, as the latter testified, "that he had promised, though Dawson did not require it, to get two other names on the notes with him," and that he would procure the names of said Gaston and the defendant; and the notes were delivered to the bank on the 27th July, 1882, and a receipt given acknowledging settlement of Fellows' indebtedness, and releasing him from all further liability on account of it. "As to whether the plaintiff was informed, before receiv-



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ing said notes, of the condition of Dawson's indorsement, the evidence was conflicting."

Baldwin testified, also, "that the bank took the notes on the faith and condition of said promise by Fellows that defendant and Gaston would indorse them." The defendant objected to the admission of this evidence, "unless it was shown that he knew of, or authorized such promise by Fellows;" and he excepted to the overruling of his objection. W. L. Chambers, the cashier of the bank, who was one of the executive committee of directors, "testified that he told Fellows, prior to the taking of said notes by the bank, that the only terms on which his indebtedness to the bank would be extended was upon his giving the names of defendant and said J. B. Gaston, in addition to said Dawson's name on said notes." The defendant objected to the admission of this evidence, "as illegal and improper, unless it was shown that he was present at the time, or was informed thereof;" and he excepted to the overruling of his objection.

It was shown, also, that Fellows obtained the notes from the bank, a few days after the 1st August, procured the signatures of Gaston and the defendant, and then returned them to the bank; but he did not disclose to either of them the condition annexed by Dawson to his indorsement. "Both the defendant and said J. B. Gaston testified, that their signatures on said notes were entirely for the accommodation of said Fellows, and without any other consideration whatever to them; that their signing said notes was an incident of said new partnership relation, but no condition or stipulation thereof, though they would not have signed the same as indorsers, if the partnership had not been agreed on; that Fellows asked it of them as a favor, and they consented to it as such, after inquiring and being satisfied both as to the solvency of Dawson and his liability to them in the event of loss by the suretyship." It was shown, also, "that neither the defendant nor said Gaston, at the time they signed said notes, had any knowledge or information whatever that said notes had been already negotiated and passed to said bank, or that Fellows had promised that their names should be placed thereon; and it was shown that neither of them had given Fellows any authority whatever to make any such promise or representation to said bank; nor did they agree to indorse said notes until after the formation of said partnership on the 1st August, 1882." It was shown, also, that when the first note matured, Dawson indorsed the new note, on the same condition as before, and on the representation of Fellows that Gaston and the defendant had signed the original notes as co-sureties with him, and would so sign the new note; and that Gaston and defendant indorsed the new note, under similar circumstances as before, in ignorance of this condition.

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The defendant requested the following charges in writing :

"1. If the defendant signed his name on the back of the notes sued on, after and under Dawson's, for the accommodation of Fellows, without an agreement to be liable as co-surety and jointly with Dawson for any loss, such signing would be no compliance with the conditions of Dawson's indorsement; that, in such case, the liability of the indorsers is successive, and not joint. And if defendant's indorsement was procured by Fellows, for his accommodation, upon the exhibition of Dawson's previous indorsement, and without disclosing that such indorsement was restricted and conditional, and when in fact it was restricted and conditional, as shown in the evidence of Dawson; then defendant's indorsement would be regarded as made on the representation of Dawson's unconditional indorsement, and would thus be fraudulently obtained. And if plaintiff afterwards acquired said notes from Fellows, defendant would not be liable to plaintiff on said indorsement.

"2. If the plaintiff discounted the original notes for Fellows on the 27th July, 1882, with Dawson's name on them as indorser, and if Dawson signed his name on the conditions shown in his evidence; then the plaintiff could not recover against Dawson, unless there was then two other persons' names on said notes in form, or under some agreement to make them joint (and not successive) sureties for Fellows; and the plaintiff could not recover against either of the two subsequent accommodation indorsers on said notes, if their indorsements were procured by Fellows without a disclosure and without information that Dawson's indorsement was restricted and conditional; and a renewal of one of these notes, in the same form, by the same persons, indorsed under like conditions by Dawson, and by the subsequent accommodation indorsers in ignorance of said defenses against the original notes, would stand on the same footing.

"3. The possession of the notes by Fellows, payable to the bank, and indorsed by third persons, before going into the hands of the payee, was notice to the bank that the indorsements were for accommodation; and if the defendant's indorsement was obtained by Fellows without disclosing the condition on which Dawson gave his indorsement (if he did indorse on the condition shown by his evidence), and if there was no agreement for the indorsers to be co-sureties with Dawson, and if the defendant indorsed for the accommodation of Fellows, in ignorance of the condition of Dawson's indorsement, and if the plaintiff took the notes from Fellows,—then the plaintiff can not stand, as against the defendant, as a *bona fide* purchaser for value in the due course of trade.

"4. If Dawson indorsed the said notes purely for the accommo-

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dation of Fellows, and upon the condition and agreement shown in the evidence of Dawson; and if Fellows procured the defendant to indorse said notes for his accommodation, after Dawson, and under his name, without disclosing to defendant the condition and terms upon which Dawson had given his indorsement, and without any agreement between the indorsers for their joint liability with Dawson; the procurement and use of defendant's indorsement under the facts was a fraud upon him, and also upon said Dawson, and defendant would not be liable on his said indorsement, to any person taking said notes from Fellows, in the form in which they were taken, even though full value was paid for said notes, and though the person taking them had no actual knowledge of said frauds.

"5. A purchase by the payee, from the maker, of a paper made and indorsed like the notes sued on, is, from the form of the paper, charged with implied notice of all the facts and circumstances under which the indorsements were made, and subject to all the defenses the indorsers may have.

"6. If Dawson, Gaston and the defendant indorsed the \$1,600 note sued on for the accommodation of Fellows, and the bank took it from Fellows, then the bank took it subject to any defense of fraud on the part of Fellows in obtaining the defendant's indorsement, whether the bank had any notice of such fraud, other than the notice disclosed by the form of the paper itself, or not.

"7. And if the renewed note was given under like circumstances, and the renewal was given in ignorance of any defense to the original note, then the renewal note would stand on the same footing."

The court refused each of these charges, and the defendant excepted to their refusal; and he here assigns as error the refusal of these charges, and the admission of the evidence to which he reserved exceptions.

GUNTER & BLAKEY, W. L. BRAGG, and THOS. H. WATTS, for appellant, made the following points: (1.) Dawson's indorsement of the notes was restricted and conditional, and Fellows had no authority to deliver or use them without a compliance with that condition; and the notes having been used in violation of that condition, there could be no recovery against Dawson.—*Guild v. Thomas*, 54 Ala. 414; *Wright v. Lang*, 66 Ala. 389; *Dawson v. Bank*, 78 Ala. 67; *Bibb v. Reid*, 3 Ala. 88; *Robertson v. Coker*, 11 Ala. 466; *May v. Robertson*, 13 Ala. 86. (2.) The defendant and Gaston did not sign as co-sureties with Dawson, but as second and third indorsers, whose liability was secondary to his, and dependent upon it. Dawson's engagement, if the condition had been written above his name, would



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have read, "I authorize Fellows to deliver this paper, when (and only when) two other solvent persons sign it as co-sureties with me;" and the contract of the others, with legal implications expressed in words, was, "This paper may be delivered as to us, when it can be delivered as to the previous parties;" or, "We are willing to become successively, after Dawson, liable for Fellows' debt." Dawson never having been bound at all, the secondary liability of the other parties never attached. The use of the note by Fellows, without disclosing the conditional character of Dawson's indorsement, was a fraud on the other parties, as well as on Dawson, which is available as a defense to an action on the notes, except in the case of a *bona fide* holder of commercial paper, acquiring it before maturity, and without notice.—*McKenzie v. Br. Bank*, 28 Ala. 609; *Mauldin v. Br. Bank*, 2 Ala. 513; *Carlisle v. Hill*, 16 Ala. 405; *Noble v. Walker*, 32 Ala. 459; *Wallace v. Br. Bank*, 1 Ala. 565; *Saltmarsh v. P. & M. Bank*, 14 Ala. 668; *Blackman v. Lehman, Durr & Co.*, 63 Ala. 550; *Tyree v. Lyon*, 67 Ala. 1; *Fenouille v. Hamilton*, 35 Ala. 319; *Miller v. Boykin*, 70 Ala. 469; *Connerly v. Insurance Co.*, 66 Ala. 434; *Boykin v. Bank of Mobile*, 72 Ala. 292; *Insurance Co. v. Quinn*, 73 Ala. 560; and authorities first above cited. (3.) The notes are not commercial paper, and the plaintiff can not claim protection against the defense here set up. The policy of the law is against paper being commercial, and protection is only extended to paper which contains every essential requisite of negotiability.—*Blackman v. Lehman, Durr & Co.*, 63 Ala. 550; 63 Ala. 626. That a note is made payable in bank, only gives it one of the requisites of negotiability. Accommodation paper is not taken in the due course of trade, and a person who takes it, with knowledge of its character, takes it subject to all defenses arising out of prior rights or equities, except as to the want of consideration. The bank took the notes from the maker, payable to itself; and without its indorsement, they could not become negotiable. Being taken from the maker, and out of the usual course of trade, the bank can not claim protection, such as is extended to the holder of commercial paper.—*Craddock v. Van Ness*, 10 Amer. Rep. 256; *Roxborough v. Messick*, 6 Ohio St. 448; *Stall v. Catskill Bank*, 18 Wend. 478; 50 N. Y. 158; *Hullum v. State Bank*, 18 Ala. 807; *Tiller v. Shearer*, 20 Ala. 596; 1 Amer. Rep. 71; 29 Mich. 358; *Thomas v. Jennings*, 5 Sm. & Mar. 629; *Gookin v. Richardson*, 11 Ala. 892; 2 Brock. 41. As a purchaser from the maker, of accommodation paper, the plaintiff did not acquire the legal title, but took the notes subject to all equitable defenses. There is no such thing as a *bona fide* purchase of an equity, entitled to protection against prior equi-

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ties.—*Boone v. Chiles*, 10 Peters, 177; 67 Amer. Dec. 608; 8 Ala. 927.

TROY, TOMPKINS & LONDON, *contra*.—(1.) The plaintiff took the notes in payment of a pre-existing debt, in the ordinary course of business, and is a purchaser for value.—*Day v. Thompson*, 65 Ala. 269; *Mayberry v. Morris*, 62 Ala. 113; Story on Prom. Notes, § 195. (2.) The defense attempted to be set up, founded on the alleged fraud or fraudulent concealment of Fellows, can not prevail against a purchaser who was ignorant of it, although he knew that the notes were indorsed for the accommodation of the maker. The New York rule, as to irregular indorsements, does not prevail with us, and it has been repudiated in other States.—*Findlay v. State Bank*, 6 Ala. 244; *Milton v. De Yampert*, 3 Ala. 648; *Price v. Lavender*, 38 Ala. 389; *Hooks v. Anderson*, 58 Ala. 238; *Rothschild v. Grix*, 31 Mich. 150; *Helms v. Wayne Agr. Co.*, 73 Ind. 325; *Anderson v. Ware*, 71 Ill. 20; 34 Ind. 251; *Dunn v. Weston*, 71 Me. 270. (3.) That the evidence of Baldwin and Chambers was properly admitted, see Wharton's Ev. § 259; *Walker v. Forbes*, 25 Ala. 139; *Gandy v. Humphries*, 35 Ala. 617.

SOMERVILLE, J.—The main question in this case, reduced to its last analysis, is simply, whether, in the case of accommodation negotiable paper, the fraud of the maker, in procuring the signature of an accommodation indorser, is a good defense to a suit brought against such indorser by the payee, who knows the nature of the paper, but is ignorant of the fraud.

We are of opinion, upon fundamental principles of law governing the subject of commercial paper, that the defense can not be sustained.

1. Accommodation indorsers, beyond all doubt, are liable precisely to the same extent as if they had received value, when the paper upon which their names appear has come into the hands of a holder for value, who has taken it *bona fide*, before maturity, and without notice of any fraud or other equity, which would vitiate it. It is entirely immaterial that such purchaser was cognizant of the fact that the bill or note was founded on an accommodation transaction, and was, therefore, to this extent, without consideration as between the indorser and the maker. The obvious reason is, that the purpose of making the paper was to loan the credit of the accommodation indorser, or other surety, to the maker, or party for whose accommodation the paper is made, that he might obtain money or credit from a third person on the faith of it. Unless this

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rule prevailed, it is easy to see how the circulation of accommodation paper would be so far frustrated as to destroy its use in commerce.—Chitty on Bills, pp. 80, 305; 2 Parsons Notes & Bills, p. 27; *Park Bank v. Watson*, 42 N. Y. 470. The rule, in other words, is, to use the language of Judge STORY, that “the parties to every accommodation bill hold themselves out to the public, by their signatures, to be absolutely bound to every person who shall take the same for value, as if that value were personally advanced to them, or on their account, and at their request.”—Story on Bills, § 192.

This familiar principle is a full answer to the argument, that the notes in suit were obtained by the plaintiff from the maker, Fellows, and that this fact charged the plaintiff with a knowledge of the nature of the paper as being of an accommodation character.

2. That the notes were taken by the bank in payment of an antecedent debt, did not render it any the less a purchaser for value, in due course of business, than if it had advanced the money on the faith of the paper. Such transactions are constantly occurring among merchants, and it may, therefore, be said to be according to their usage. The notes were payable to the bank on their face, and of this fact the defendant was necessarily apprised, when he loaned Fellows the credit of his indorsement.—1 Parsons Notes & Bills, pp. 256–257; 2 Lead. Cas. 242; *Connerly v. Planters' Ins. Co.*, 66 Ala. 433; *Bank of Mobile v. Hall*, 6 Ala. 639. The case of *McKenzie v. Branch Bank*, 28 Ala. 606, cited and relied on so strenuously by appellant's counsel, is easily distinguishable from this case. Here, accommodation paper is taken in absolute payment of a pre-existing debt—there only as *collateral security* for such debt. In the former case, the holder, under our decisions, is a purchaser for value; in the latter, not.—*Miller v. Boykin*, 70 Ala. 469.

3. That the liability of the defendant was that of an indorser, is too well settled by the decisions of this court to admit of discussion. It is true that his name was written in blank on the back of the notes, before they had been indorsed by the payee, who never put them in circulation; and the indorsement was, therefore, what is commonly termed an irregular and imperfect one. But this was immaterial, as no effort is made to show by parol evidence, or otherwise, that the defendant, at the time of the indorsements, in any manner qualified or restricted his liability, so far as concerns the plaintiff, or contracted to assume, as between him and the plaintiff, any other liability than that of an indorser.—*Hooks v. Anderson*, 58 Ala. 238; *Price v. Lavender*, 38 Ala. 389; *Tankersly v. Graham*, 8 Ala. 251; *Jordan v. Garnett*, 3 Ala. 610; *Day v. Thompson*,



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65 Ala. 269. The case raises no inquiry as to the circumstances under which irregular indorsements may be qualified by parol proof of the real contract between the parties litigant—who are here the payee and the indorser. As between the indorsers themselves, the inquiry might assume entirely another phase, which it is unnecessary for us to discuss.

4. This brings us back to the first inquiry, as to how far the alleged fraud practiced by the maker, whereby he obtained the consent of defendant to become one of his accommodation indorsers, is to affect the payee, who is entirely ignorant of it. The evidence shows that Dawson, the first indorser on the notes, made his indorsement upon the condition, that the maker, Fellows, was to obtain the names of two other responsible indorsers on the paper, before delivering it to the bank, such indorsers to be jointly liable with him. This condition was not communicated to the defendant, and this may be admitted to be a *suppressio veri*, which was a fraud in law. But the plaintiff was as ignorant of the alleged fraud as was the defendant, being an innocent purchaser of the legal title, before maturity, and for value. Why should the bank, then, be held responsible for a deception in which it had no participation? Its officers trusted to the paper, and the affirmed genuineness of the signatures, which were sufficient on their face to create a legal liability. They placed no special trust in any representations of the maker, as to the nature of the paper. The defendant, however, trusted the maker, by standing as his surety, and did not either inquire or inform himself as to the terms upon which Dawson had indorsed the notes. One giving currency to commercial paper, by indorsement, is understood, not only to assert the genuineness of all previous signatures, but also “the regularity of all such previous transactions as he was bound to know.”—2 Greenl. Ev. § 164. He was guilty of negligence, in this particular; and its consequences should rather be visited on him, than upon one who has parted with value on the faith of his indorsement.—*Anderson v. Warne*, 71 Ill. 20; s. c., 22 Amer. Rep. 83. Fellows, moreover, was, to a certain extent, the agent of the defendant to deliver the note to the bank—without special instructions, and without the imposition of any conditions or terms of delivery. Here, again, was the reposing of confidence; and the rule is, that where one puts trust and confidence in a deceiver, it is more reasonable that he should be the loser than a stranger, who deals with him without any relations of confidence. The case can scarcely be stronger, than if the notes had been indorsed to be used for some special purpose, and had been fraudulently misappropriated to another purpose by the maker, without knowledge on the part of the payee of such restriction

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or misappropriation. Yet, in such a case, it has been often held, that a *bona fide* holder for value can recover of the accommodation indorser, although he knows that the paper is founded on an accommodation transaction.—*Merchants' Bank v. Comstock*, 14 Amer. Rep. 169; *Quinn v. Ward*, 5 Amer. Rep. 284; 1 Parsons Notes & Bills, p. 279, note (n); 2 *Ib.* p. 27. So, it is decided, where a surety fixes his signature after others which are forged, and while it is yet in the hands of him for whose benefit the note is drawn, that this would be no such fraud as would vitiate the paper in the hands of an innocent holder for value, who was not privy to the fraud.—*Selser v. Brooks*, 3 Ohio St. 302. In *Helms v. Wayne Agricultural Co.*, 73 Ind. 325, where the name of one of the makers of a note was forged, and another signed it as surety only, under the belief that the forged name was genuine, he was held to be bound nevertheless to the payee, who was without notice of the forgery. *A fortiori*, should this be true, in view of the fact that such indorsement is, in a certain sense, a separate and distinct contract with the payee, or holder, by which it is agreed that every indorser severally will pay the debt, if by the use of due diligence it can not be collected from the maker. The case of *Anderson v. Warne* (71 Ill. 20; s. c., 22 Amer. Rep. 83), cited *supra*, is an authority for the proposition, that where a surety is induced by the fraud of the maker to sign a note, this fact constitutes no defense to an action brought by the payee on the note, unless the latter's participation in the fraud is proved; and this principle, we think, is both reasonable and just, at least in cases of commercial paper, which is held by a purchaser for value without notice of the fraud.—*Helms v. Wayne Agricultural Co.*, 73 Ind. 325; *Farmers' & Traders' Bank v. Lucas*, 26 Ohio St. 385; 2 Randolph on Commercial Paper, § 919.

5. The principle decided in *Guild v. Thomas*, 54 Ala. 414; s. c., 25 Amer. Rep. 703, and *Bibb v. Reid*, 3 Ala. 88, touching the liability of sureties on bonds conditionally delivered, has no application to commercial paper in the hands of an innocent purchaser, and acquired before maturity, and, therefore, furnishes no rule for our guidance in this case.—1 Daniel Neg. Instr. (3d Ed.) § 856; *Deardorff v. Foresman*, 24 Ind. 481; *Guild v. Thomas*, *supra*; 25 Amer. Rep. 710, note; *First Nat. Bank v. Dawson*, 78 Ala. 67.

6. But one other point remains to be considered, and this arises on an objection to a statement of the witness Chambers, who, as an officer and agent of the bank, clothed with unquestionable authority, informed Fellows, during the progress of his negotiation with the bank, for its taking of the notes, that they would not be taken without the names of Marks and

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Gaston as indorsers. It is objected, that this conversation was not known to defendant Marks, and was not, therefore, admissible against him. The answer to this objection very obviously is, that this statement was part and parcel of the agreement between Fellows, the maker of the notes, and the bank, as payee, constituting one of the conditions on which the paper would be received, and that the defendant became connected with it by afterwards indorsing the notes, thus literally carrying the agreement into execution. It was *res gestæ* to the main fact, and illustrative of its very essence. It was admissible on another ground. The notes were in the possession of the bank, or payee, when Marks signed them. Unless the signing had been executed pursuant to a previous agreement to that effect, the contract of indorsement on Marks' part would have been without consideration. The testimony of Chambers was, for this reason alone, relevant, to show a consideration for defendant's assumption of liability, the paper not being complete and perfect in the absence of his signature, for the giving of which there had been an express stipulation.—*McNaught v. McLaughry*, 42 N. Y. 22.

There is, in our opinion, no error in the record, and the judgment must be affirmed.

CLOPTON, J., *not sitting*.

NOTE BY REPORTER.—On a subsequent day of the term, in response to an application by appellant's counsel for a rehearing, the following opinion was delivered :

STONE, C. J.—There is an able and elaborate argument for a rehearing in this cause, but I think it misapprehends both the force of our statute, and the rulings made by this court on irregular indorsements. The statute declares—Code of 1876, § 2094—that “Bills of exchange and promissory notes payable in money at a bank or private banking-house, or a certain place of payment therein designated, are governed by the commercial law.” The notes sued on in this case are, on their face, made payable to the order of the First National Bank, at its office in the city of Montgomery. This, by the terms of the statute, constituted them commercial paper. And the notes, on their face, are made payable to the said bank. When the bank acquired the ownership, it acquired the legal title, and the right to sue in its own name, not by virtue of the indorsement, but by the very face of the notes. This difference distinguishes this case from those brought on bills of exchange having irregular indorsements not vesting the legal title in the holder.



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The notes sued on in this case, as we have seen, are on their face promissory notes made by Fellows, payable to the First National Bank of Montgomery. The names of the appellant and two others appear on the back of them as indorsers. Under some very able judicial systems, such indorsements constitute the indorser a surety of the maker, made liable to the same extent, and by the same form of proceeding, as if he had signed his name as co-maker with the principal.—*Rey v. Simpson*, 22 How. U. S. 341; *Chaddock v. Vanness*, 35 N. J. Law, 517; s. c., 10 Amer. Rep. 256. A different rule prevails in Alabama, and has prevailed so long, that we have no wish to disturb it. Speaking of such indorsements, it was said in *Price v. Lavender*, 38 Ala. 389, “that unexplained, they impose a liability in favor of the person to whom the indorsement is made, against the indorser, which is strictly analogous to the liability upon a regular indorsement.”—*Hooks v. Anderson*, 58 Ala. 238. Applying that principle to this case, timely notice of non-payment by the maker was required to be given to the indorser, as the means, and only proper means of fixing the latter's liability. That is shown to have been done in this case.

It is contended for appellant, that because Fellows, the maker of the notes, carried them to the bank, and himself received the benefit of their discount or purchase, this was itself notice to the bank that the indorsers were mere accommodation parties; and lets in proof of the violation of the authority and restricted power which had been confided to him, Fellows, by Dawson, the first indorser. If the acceptor of a bill of exchange, or maker of a promissory note, himself present it at a bank, procure its discount, and receive the money, the proceeds of the discount, this is certainly notice to the bank that the other names on the paper are accommodation parties. What duties such notice or knowledge casts on the bank are not defined with that definiteness and uniformity we could desire.—*Mauldin v. Branch Bank*, 2 Ala. 502; *McKenzie v. Branch Bank*, 28 Ala. 606; *Saltmarsh v. Planters & Mer. Bank*, 14 Ala. 668, and cases cited. It is very clear, under these authorities, that the offer of a paper for sale or discount, if made by the party primarily liable for its payment, is evidence that the paper represents no existing debt, but is only an offer to incur one. The purchase of such paper at a greater rate of discount than eight per cent. is usurious.

Suppose, however, some of the makers of the paper signed it for the accommodation of the principal debtor, and the bank knew such was the case, what difference can that make? A consideration moving to the principal upholds not only his promise, but that of the surety or indorser, who signs before

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the negotiation of the paper.—*Rutledge v. Townsend*, 38 Ala. 706.

The principle we have been discussing has nothing to do with this case. The notes were made to be discounted or purchased, and were purchased, not with money paid to Fellows. No money was to be paid to him, and none was paid to him. They were made to be used as an extension and novation of a debt already due from Fellows to the bank. Giving new notes, with additional parties bound, having several months to run, and the surrender of the evidence of the old debt, constituted a novation, and the creation of a new debt, the surrender of the old note being the consideration for it. It is not pretended the new notes are greater in amount than the debt taken up, with interest added. The surrender or cancellation of a debt is, equally with money paid, a valuable consideration parted with, which will uphold as *bona fide* a purchase made of which it is the consideration.—*Spira v. Hornthall*, 77 Ala. 137.

Nor is there anything in the fact that Fellows himself carried the notes to the bank. He, of all men, was the person to carry them, for with them he was negotiating a settlement, and did settle a debt he owed the bank. Being the debtor, it was his duty to make payment, and he only discharged that duty when he delivered the new notes in discharge of the old. This fact distinguishes this case from *Mauldin v. Branch Bank*, *supra*, and the cases which follow it. And it would seem there was no occasion for invoking the doctrine of presumption in this case. The entire transaction shows that every one connected with it, including the bank, knew that Fellows was the debtor, and the appellant only his surety. An indorser of a note is a surety for the maker, who is the principal debtor. This is particularly so, when the indorsement is for accommodation. 2 Dan. Neg. Instr., § 1303. Why resort to presumption, when the admitted fact stands prominently out?

To summarize: The notes were commercial paper on their face. The bank purchased them in the regular course of its business, paying a present, adequate consideration for them, in the surrender of the old debt on Fellows. The notes were carried to the bank, and the negotiation and sale made by Fellows, the most natural person in the world to perform such service. And the liability of the appellant being the same as that of a regular indorser of commercial paper, that liability has been fixed by the failure of his principal to pay, and timely notice thereof given to him.

I fully concur in the argument and conclusions of my brother SOMERVILLE, and the petition for re-hearing is overruled.

## Moses Brothers v. Micou.

*Bill in Equity by Creditors, to compel Execution of Trust in favor of Married Woman.*

1. *Trust for married woman and children; what estate she takes, and when equity will not, at instance of creditors, enforce execution of trust, in her favor.*—When infant children, having obtained decrees against their guardian and his sureties on settlement of his accounts, transfer and assign such decrees to a trustee, upon trust so to proceed, in the enforcement of the decrees by execution, as to secure to them certain designated property free of expense, “and upon the further trust to purchase the remainder of the property sold under said execution, and to settle that part thereof held and owned by said M. [the guardian], and sold as his property, on his wife and children, in such proportions as said trustee may in his discretion consider fitting;” the wife of said M. does not take, under the deed of assignment, such an estate or interest in the property purchased and held by the trustee, as can be subjected in equity to the payment of debts contracted by her; nor will a court of equity, at the instance of her creditors, compel the trustee to execute a settlement in her favor.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on the 1st September, 1882, by Moses Brothers as partners, claiming to be creditors of Mrs. Mary J. Micou, the wife of Benjamin H. Micou, against her and her husband, their infant son, B. H. Micou jr., Henry C. Semple, and others; and sought to subject to the satisfaction of the complainants' debts against Mrs. Micou her interest in the crops raised on certain lands called the Prairie and the Wallahatchie plantations, and also in the lands themselves, the legal title of which was vested in said Semple as trustee; and, if necessary, to compel said Semple to execute a settlement of the trust in favor of Mrs. Micou, so that her interest in the property might be reached and subjected to the payment of said indebtedness. Said lands were sold under executions against said Benjamin H. Micou, issued on decrees rendered against him by the Probate Court of Tallapoosa county, on final settlement of his accounts as guardian of Clara E. and Lucy Micou, his children by a former wife; and other lands and property were sold at the same time under said decrees and executions, which belonged to Thomas M. and Nicholas D. Barnett, who were the sureties of said Micou on his official bond as such guardian. Semple became the purchaser of all the property at the sale, and held the same pursuant to the



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terms of a deed of assignment executed to him by the plaintiffs in the decrees, a copy of which was made an exhibit to the bill, and which was in these words :

"This indenture, made by and between Clara E. Boykin and Francis S. Boykin, husband of the said Clara, Lucy Micou and Henry C. Semple, witnesseth, that the said Clara and Francis Boykin and Lucy Micou, in consideration of one dollar paid to them by said Henry C. Semple, and of other good and sufficient considerations, have respectively assigned, sold, transferred and set over to the said Henry C. Semple the two judgments or decrees of the Probate Court of Tallapoosa county, in their favor respectively, against Benjamin H. Micou, and Thos. M. and Nich. D. Barnett as sureties of said Micou, with the executions issued thereon, with the right to control, manage, collect and receive the amount of said decrees and executions; but upon trust nevertheless—1st. So to proceed upon the same as to secure to the said Clara E. and Lucy, clear of all expense to them, the title to the property in the city of Montgomery," describing certain houses and lots belonging to said Micou; also, a plantation in Macon county, with the stock on it, and a one-third interest in a place in Elmore county, also belonging to said Micou. "2. Upon the further trust, to purchase and convey to the said Clara E. and Lucy, each, one-sixth of all the stock owned by the defendants, which can be sold under execution on said decrees. 3. Upon the further trust, to purchase so much of the remainder of the property held and owned by said defendants respectively as can be sold under said executions and purchased therewith; and to settle that part of it owned by said Benjamin H. Micou, and sold as his property, on the wife and children of the said Micou by his present wife, in such proportions as the said trustee may consider fitting; and to settle that part of it so purchased, which is sold as the property of said Thos. M. Barnett, on the wife and children of the said Thos. M. Barnett, in such proportions as the said trustee may think fit; also, to settle such part as shall be sold as the property of the said Nich. D. Barnett, on the wife and children of the said Nich. D., in such proportions as the said trustee may in his discretion think fit. But the whole of the property so settled on the family of the said Thos. M. Barnett shall be charged with the sum of eight thousand five hundred dollars, to be paid to the said Clara E. and Lucy; and the whole of the property so settled on the family of the said N. D. Barnett shall be charged with a like sum, to be paid to the said Lucy and Mary E., with interest to be paid annually, until said sums are paid; the principal not to be required to be paid until January 1st, 1876, provided the interest thereon is punctually paid at the end of each year from the date of the sales. It is

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understood, however, that all the expenses and costs of obtaining and executing said decrees are to be paid by said trustee out of the proceeds thereof, and that the property and money herein provided to be settled on the said Clara E. and Lucy is to be received by them clear of all expense. In witness whereof," &c. (Signed by said grantors, dated April 4th, 1874, and attested by two witnesses.)

A demurrer to the bill for want of equity, on several grounds specifically assigned, was interposed by the defendants, and was overruled by the chancellor; but, on final hearing, on pleadings and proof, he dismissed the complainants' bill, holding that the evidence did not show any debt contracted with them by Mrs. Micou, for which her interest in the rents or lands was liable in equity, beyond the amount of a debt secured by mortgage, which had been paid.

The decree dismissing the bill is now assigned as error.

TROY, TOMPKINS & LONDON, for appellants.

GUNTER & BLAKEY, *contra*.

CLOPTON, J.—In April, 1874, Francis S. Boykin and his wife, Clara E. Boykin, and Lucy B. Micou transferred and assigned to Henry C. Semple two decrees, which had been rendered in their favor by the Probate Court, and the executions issued thereon, against Benjamin H. Micou, and the sureties on his bond as guardian, upon trust so to proceed on the same as to secure to the plaintiffs in execution specified property, free of expense; and "upon the further trust to purchase so much of the remainder of the property held and owned by the said defendants, as can be sold under said executions, and purchased therewith; and to settle that part of it owned by Benjamin H. Micou, and sold as his property, on the wife and children of said Micou by his present wife, in such proportions as said trustee may in his discretion consider fitting." Under the power conferred, Semple purchased the real and personal property mentioned in the bill, but has never settled the same permanently, though arrangements have been made from year to year, whereby the wife and child, there being only one, should receive the benefit of the rents, income, and profits. The complainants allege, that in 1880 they made large advances to Mrs. Micou, to enable her to cultivate the plantation, and for the support of her family; a part of which indebtedness was paid, but a large balance remains unpaid. The purpose of the bill is to subject the estate of Mrs. Micou in the property to the payment of the indebtedness, and, if necessary, to compel the trustee to execute the power conferred on him, to the extent

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of determining the proportion of Mrs. Micou in the trust estate. The material question is, did Mrs. Micou have an estate in the property which she had the capacity to charge?

When the objects of a trust do not take immediately under it, but some further act, such as a conveyance or settlement to be made by a third person, according to the general directions of the grantor, is required to vest the estate, or to consummate the purposes, it is said to be executory. The trustee was authorized to purchase the property, and to settle it on the objects, fixing their respective proportions. The trust is executory. The instructions as to the settlement of the property are general, and the form and terms are to be determined by the intention of the donors, which must be ascertained by the surrounding facts and circumstances.—1 Perry on Trusts, § 359. Though the instrument, creating the trust, does not direct in what mode, or upon what limitations, the property shall be settled on Mrs. Micou; her husband being at the time insolvent, or greatly embarrassed financially, the intention may be fairly inferred, that the property should be settled in such manner as to protect it from being subjected to his debts. Provision for the wife is one of the purposes of the trust; and any conveyance or settlement, which does not secure the property from the reach of the husband's creditors, would subject it to diversion from the use and benefit of the object of the trust, and defeat its purposes. Without a statute creating separate estates, this could only be accomplished by a conveyance or deed of settlement, containing apt and appropriate words to exclude the marital rights of the husband. But, at the time the original gift was made, there were, and had been for more than thirty years previously, statutes of force, declaring that the property held by the wife at the time of marriage, or which she might thereafter be entitled to, is her separate estate, and is not subject to the payment of the debts of the husband. While, by the earlier decisions of this court, there existed two classes of separate estates—equitable and statutory—differing in nature and quality, the line of separation between the two classes was obliterated by a series of decisions, announcing a different and antagonistic rule, commencing in 1869; which latter construction of the statute continued until 1875, when those decisions were overruled, and the distinction re-established in *Short v. Battle*, 52 Ala. 456. At the time the instrument creating the trust was made, the prevailing judicial interpretation of the statute was, that they abrogated all laws governing equitable separate estates, and substituted the statutory estate, except when a trustee was interposed to receive the rents, income, and profits. The accepted judicial exposition of the statutes, that the estate is statutory, whether or not the conveyance under



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which the wife held contained words of exclusion, may reasonably account for the absence of any direction as to the character of the estate to be vested in Mrs. Micou, the estate being considered statutory under any form of conveyance. We can not, therefore, infer an intention of the donors, that an equitable, as distinguished from a statutory separate estate, should, by the settlement, be vested in Mrs. Micou.—*Lee v. Lee*, 77 Ala. 412. Neither does the use of the term “to settle” necessarily import such intention. The power to settle property is power to arrange the mode and extent of enjoyment. Under the circumstances, especially since the distinction between the two classes has been re-established, the trustee will effectuate the intention of the donors, and accomplish the primary purposes of the trust, by a settlement which creates in Mrs. Micou either an equitable or a statutory separate estate.

Where the instrument, creating a trust, gives property to a class of objects, with power in the settler to subsequently determine the shares, until the power is exercised, or in default of appointment, the property vests in all the members of the class.—2 Smith’s Lead. Cas. 1852. Were it conceded, that the assignment to Semple vested an estate in the subsequently acquired property in Mrs. Micou and her children, the character and quality of such estate would be determined by the expressed terms of the original gift, until changed or divested by the exercise of the power of the trustee to settle in such proportions as he might consider proper. The uniform ruling has been, that a gift of property to a married woman, without words which would have created a separate estate before the statute, is a statutory separate estate. The assignment contains no words expressing a clear intention to exclude the marital rights of the husband. A declaration of settlement in the terms of the instrument, fixing the proportion, and with apt words to pass the legal title, would vest in Mrs. Micou a statutory separate estate.—*Patterson v. Kicker*, 72 Ala. 406. If, then, she takes directly under the instrument, the estate thus taken would be of a character and incidents which she is incapacitated to charge for the debts of herself or of her husband, except for articles of comfort and support of the household, and for tuition for her children. In such case, the equitable estate is governed by rules applicable to legal estates.—1 Perry on Trusts, § 359. But, at the time of making the original gift, the property had not been acquired. The assignment to Semple is not a conveyance of the property subsequently purchased, but the transfer and control of the decrees and executions upon trust to purchase property by their use, which property, when purchased, he was empowered, and it became his duty to settle, under proper circumstances, as provided and required by the

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assignment. Mrs. Micou and her children acquired, in or by means of the original gift, the right and equity to have the subsequently purchased property settled in execution of the trust; but no estate therein vests, until the power is exercised, and the property settled, ascertaining the proportions. It follows, that under either construction of the original gift, Mrs. Micou did not hold or own, in 1880, an estate which can be subjected to the payment of the debt of complainants.

If, in any case of executory trust, a court of equity will compel a trustee to exercise his power of appointment, at the instance of a creditor of one of the beneficiaries, which we do not decide, the court should not enforce its exercise, when thereby the trustee can defeat and make unavailable any decree that may be rendered in favor of the creditor. If the trustee deemed an equitable estate most proper, he may accompany it with the usual powers which a court of equity would sanction or insert for the protection of the married woman, if decreeing or authorizing an execution of the trust. He may incumber it by a prohibition or limitation of the power to charge, or alienate, or to anticipate the income.—*Temple v. Hawley*, 1 Sand. Ch. 153. Or he may allot to Mrs. Micou only a nominal proportion. With the exercise of his discretion in determining the proportions, the court will not and can not interfere, in the absence of collusion or fraud. "When the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the distribution or apportionment made by such trustee can not be impeached, on the ground that it is unsubstantial, illusory, or nominal." Code, § 2213.

It results, that the bill is without equity. This conclusion renders unnecessary a review of the chancellor's finding of the facts.

Affirmed.

## **Gilmer v. Mobile & Montgomery Railway Co.**

### *Action for Breach of Covenant.*

1. *When covenant runs with land.*—A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's lands fifty feet wide on each side of the track, to erect a "flag-station" at a point convenient to his house, to permit him to cultivate all the

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land embraced in the grant which was not needed for use by the railroad company, and, if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This action was brought by George N. Gilmer, against the Mobile & Montgomery Railway Company, as the assignee and successor of the Alabama & Florida Railroad Company, to recover damages for alleged breaches of covenant; and was commenced on the 30th March, 1885. The covenants alleged to have been broken were contained in a written instrument under seal, dated March 7th, 1868, by which the Alabama & Florida Railroad Company, "in consideration," as therein recited, "of George N. Gilmer having sold and conveyed to said railroad company, for the sum of one dollar, the right of way and the land for fifty feet on each side of the centre line of said railroad extending through his plantation, and certain other privileges mentioned in the deed of conveyance given by said Gilmer," agreed and bound itself as follows: "The Alabama & Florida Railroad Company will stop the passenger and freight trains (when proper signals are given) at some convenient point opposite the house of said Gilmer, and receive and discharge (without extra charge) passengers and the sacked and baled produce of the farm, or other freight or produce of said farm, when the receiving and delivery of said other freight and produce can be done without seriously interfering with the running of schedule. The further privilege is given said Gilmer to cultivate such parts of said right of way not used by said railroad company, so long as the same may not interfere with the wants and requirements of said railroad company; and further, if at any time the said railroad company should erect a depot on said right of way, the sale of ardent spirits will be strictly prohibited." The complaint claimed that these stipulations were covenants running with the land, and were binding on the defendant as the assignee and successor of said Alabama & Florida Railroad Company; and alleged specific breaches of each. The court sustained a demurrer to the complaint, on the ground that the covenants were not binding on the defendant as assignee; and the judgment on the demurrers is now assigned as error.

TROY, TOMPKINS & LONDON, and MACDONALD & FERGUSON, for the appellant, contended that the covenants ran with the land, and cited the following authorities: *Robbins v. Webb*, 68 Ala. 393; s. c., 77 Ala. 176; *Atlantic Dock Co. Leavitt*, 13 Amer. R 556; Platt on Covenants, 69; *Norman v. Wells*,



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17 Wendell, 136; *Vernon v. Smith*, 5 Barn. & Ald. 1; *Vivyan v. Arthur*, 1 B. & C. 410; *Spencer's case*, 1 Smith's L. C. 63; *Patton v. Deshon*, 1 Gray, 525; *Norfleet v. Cromwell*, 70 N. C. 634; *Post v. Kearney*, 2 N. Y. 394; *Astor v. Hoyt*, 5 Wendell, 603; 2 Yeates, 74; 17 W. Va. 427; 64 Geo. 492; *Rennsalaer v. Dennison*, 35 N. Y. 393; *Moreland v. Cook*, 6 Eq. Cases, 252; 2 Phil. Ch. 774; *Cook v. Chillcott*, L. R., 3 Ch. Div. 694; 6 Heiskell, Tenn. 433; 19 Ohio St. 66; *Dorsey v. Railroad Co.*, 58 Ill. 65; *Howland v. Coffin*, 12 Pick. 125; 19 N. Y. 81; 27 Barb. 151; 12 N. Y. 131; 46 Penn. St. 445; 7 Peters, 606; *Baldwin v. Walker*, 21 Conn. 163; *Crawford v. Chapman*, 17 Ohio, 449.

WATTS & SON, *contra*, cited Rawle on Covenants, 342-3; Smith's Lead. Cases, vol. 1, p. 108; 4 Kent's Com. 471-72, note; *Brewer v. Marshall*, 18 N. J. Eq. 337, 342; *Conover v. Smith*, 17 N. J. Eq. 51; 2 Sugden on Vendors, 157, 191; 6 Wait's Ac. & Defenses, 396.

SOMERVILLE, J.—The action is one at law for the breach of certain covenants entered into with the plaintiff by the Alabama & Florida Railroad Company, a body corporate, from which the defendant derived title, as assignee, to a strip of land, including the right of way, through the farm of the plaintiff, situated in the county of Lowndes. In March, 1868, the appellant, who was plaintiff in the court below, conveyed to the said assignor of defendant this right of way and land, extending fifty feet on each side of the center line of the railroad track. In consideration of this grant, the said Alabama & Florida Railroad Company agreed in substance, by a separate instrument, to establish what we may briefly denominate a *flag-station* on said land, at a convenient point adjacent to the plaintiff's house, where both passenger and freight trains would stop, upon the giving of proper and usual signals, for the transportation of passengers and certain kinds of produce. The plaintiff was to have the right to cultivate so much of this right of way as may not be needed for use by the railroad, and so long as such cultivation did not interfere with its wants and requirements. It was further stipulated that, in the event of a depot being erected on the premises, the sale of ardent spirits would be strictly prohibited.

It is averred that the defendant corporation derived title by succession from the original vendee and covenantor, with full knowledge of the obligations growing out of the contract.

The Circuit Court sustained a demurrer to the complaint, and dismissed the action, on plaintiff's refusal to amend.

There is an agreement of counsel waiving so much of the

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demurrer as raises any question touching the plaintiff's right to bring the action in his name, if it would lie at all upon the facts stated. The consideration of this point we, therefore, pretermitt, assuming that the action was properly brought in the name of the plaintiff as husband, for the use of the wife.

The question for decision is, whether the covenants in question, or either of them, so run with the land, as to be of binding obligation at law upon the defendant, as the assignee of the covenantor.

A covenant is said "to run with land" when the liability to perform it, on the one hand, or the right to enforce it, on the other, passes to the vendee, or other assignee of the land. Such covenant must relate to, or, as is more commonly said, "touch and concern the land," and not as merely collateral to it, in order that the assignee of the land may be charged with their benefit or burden.—*Spencer's Case*, Smith Lead. Cas. 27. They are often called real contracts, because they are annexed or inhere to the realty as part and parcel of it, and "pass from hand to hand with the interest in the realty they are annexed to." 1 Addison Contr. § 430. And no doubt seems to exist as to the rule, that covenants may run with incorporeal, as well as with corporeal hereditaments, as in the case of tithes and rent-charges, which savor of the realty, because they are carved out of and charged on it.—2 Sugden Vend. 482. It is impossible to lay down any fixed rule by which to distinguish in all cases real covenants, which run with land, and are binding as such on heirs, devisees, and assignees, from those which are merely personal, and are binding only on the covenantor and his personal representative. The subject is one full of intricate learning, and the decisions of the courts touching it are greatly conflicting, and far from satisfactory. Among those, however, which have been decided to follow the realty into the hands of an assignee, are covenants of warranty and for quiet enjoyment, covenants by tenants to pay rent, to repair, maintain fences, reside on the premises, or cultivate the demised lands in a particular manner; not to carry on a particular trade on the premises leased or purchased; not to build on adjacent premises, and many others of an analogous character. Among those adjudged to be personal, and not therefore to touch or concern the land, are covenants made by owners of land between whom and the covenantee there is no privity or title or estate; a covenant not to hire persons of a certain description to work in a mill; or a covenant with a stranger not to permit a grist-mill to be erected on the owner's premises; a covenant by the vendor of lands not to permit marl to be sold from adjoining lands; by a lessee of a house to pay so much for every tun of wine sold in the house; or to buy all beer used by him from his

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lessors or from his successors in trade.—Law Real Property (Boone), § 317; 1 Addison Contr. § 436; 2 Greenl. Ev., § 240; 1 Parsons' Contr. 231–233.

We cite two familiar cases only to illustrate the want of harmony in the decisions. In *Taylor v. Owens*, 2 Blackf. (Ind.) s. c., 20 Amer. Dec. 115, the owner of a town-site made a lease in which he covenanted that the lessee should have the exclusive right to sell merchandise in the town for ten years. It was held that the covenant did not run with the land, so as to be binding on subsequent purchasers of other town lots from the lessor. In *Norman v. Wells*, 17 Wend. 137, the defendant leased a mill-site to one from whom the plaintiff took by assignment, covenanting not to erect a rival mill on the same stream passing through his, the lessor's land. This was held to be a covenant running with the land, although it was to do something off the land demised, because it affected its value. It is observed by Mr. Washburn, that "such covenants, and such only run with the land, as concern the land itself, in whosoever hands it may be, and become united with and form a part of the consideration for which the land, or some interest in it, is parted with between the covenantor and covenantee."—2 Wash. Real Prop. (4th Ed.) 286 (16). And this is, perhaps, a correct principle.

As the class of covenants under consideration are annexed to the realty, and pass with it to the assignee as incident to it, the rule prevails, that there must be some privity of estate or of contract between the plaintiff and the defendant, before a covenant relating to land can be of binding force on the assignee of the covenantor, and that usually the covenantee must have some interest in the land, to which the covenantor's promise may be annexed; otherwise there would be nothing with which the covenant could run, or to which it could adhere as an incident. A distinction is sought to be made, between the *burdens* and the *benefits* of such covenants; the assertion being made in the notes to *Spencer's case*, *supra*, that, at common law, the *burden* of covenants never run with land, save where there was a privity of estate between the covenantee and the covenantor—in other words, where there was a conveyance from one to the other—while the *benefit* might, in all cases, run without such privity or conveyance.—1 Smith's Leading Cases, 127, note. The soundness of this rule may be questioned, and there are numerous cases holding to the contrary; for, as said by SELDEN, J., in *Van Rennsalaer v. Read*, 26 N. Y. 558, 574, "it has often been held, that covenants, both in their benefits and their burdens, run with the land where no tenure, in its strict sense, exists between the parties." But the necessities of the case in hand do not require us to discuss this particular branch of the



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subject. Here, as we shall show, there is a privity of estate between the parties litigant; and that fact brings the case within the rule, that the burdens imposed on the land by the covenantor might follow it into the hands of the defendant as assignee and purchaser.

The question arises, what is the nature of that privity of estate which the law requires in order that the covenants may run with the lands. It is now settled among other rules, contrary to the earlier view of the subject, that the relationship between the parties need not be that of landlord and tenant, although this is clearly sufficient, and presents the most frequent instance of the application of the principle. There are well considered cases to be found, where land has been conveyed to vendees, charged with the payment of a perpetual "rent-charge," and the purchasers or assignees from such vendees have been held liable in covenant for the annual rents, and the right to sue has been decided to enure to the assignees of the rent; and this on the principle, that "the common ligament, the estate charged, unites the parties in interest as privies."—*Van Rennsalaer v. Read*, 26 N. Y. 558. But, however this may be, there can be, in our opinion, no doubt as to the soundness of the principle, that this privity sufficiently exists, if the covenantee retains or acquires an easement, or interest in the nature of an easement, appurtenant to the lands to which the covenant relates; and this, whether such easement is acquired by grant or reservation, in either of which modes it may be created.—*Bronson v. Coffin*, 108 Mass. 175; s. c., 11 Amer. Rep. 335. Such easement is a privilege which the owner of one tenement has a lawful right to enjoy, in respect to that tenement, in or over the tenement of another person; and is usually created by imposing an obligation upon the owner of the servient tenement, in favor of the dominant estate, either to suffer something to be done, or to abstain from doing something, on or about the premises.—4 Kent's Com. 419; Washb. Easements, 4-5; *Robbins v. Webb*, 77 Ala. 176; s. c., 68 Ala. 393; *Parsons v. Johnson*, 68 N. Y. 62; s. c., 23 Amer. Rep. 149.

We think, in this case, the plaintiff retained an interest in the land conveyed to the assignor of the defendant, which was in the nature of an easement. He not only imposed a servitude upon the land, by a prohibition against the sale of ardent spirits on the premises, but retained the right to cultivate it under certain conditions and circumstances; thus retaining an interest in the realty which would preserve the privity of estate in it, and to which the covenant of defendant would attach, or become annexed.

A proper application of these principles leads us to the conclusion.  
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elusion, that the condition assumed by the Alabama and Florida Railroad Company, the defendant's assignor, by which it was agreed to establish a "flag-station" on the road adjacent to plaintiff's house, and to permit plaintiff to cultivate the land on which the right of way was granted, imposed a burden on the land itself, and was not a mere personal covenant. It touched and concerned the land itself, and was not collateral to it, because it was to be performed on it, and affected the value of the adjacent land of the grantor, being greatly beneficial to it; and was in the nature of compensation by way of rent for the land conveyed, no other consideration having been paid therefor than that which was confessedly nominal.—1 *Smith's Lead. Cases*, 22–27, and *note*, with cases cited. Its performance or non-performance, also, affected the mode of enjoyment of the granted premises, and their value or quality, so as to render the title acquired by the vendee a subordinate one; and this is one of the tests by which to decide whether the covenant is inherent in the land itself.—1 *Addison on Contracts*, § 435. In other words, the covenant of the vendee "qualified the estate which he took, and attached itself to that estate." *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; s. c., 13 *Amer. Rep.* 556. Without consuming time to review the adjudged cases, we refer to the following authorities in support of this conclusion: *Morse v. Aldrich*, 19 *Pick.* 449; *Bronson v. Coffin*, 11 *Amer. Rep.* 335; *Wollscroft v. Morton*, 15 *Wisc.* 198; *Norman v. Wells*, 17 *Wendell*, 136; *Van Rennsalaer v. Read*, 26 N. Y. 558; *Trustees of Watertown v. Cowen*, 4 *Paige*, 510; 15 *Sim. Eng. Ch.* 228; 1 *Smith's Leading Cases*, 27, and *notes*; *Fulton v. Stuart*, 15 *Amer. Dec.* 542, and *notes*; *Webb v. Robbins*, 68 *Ala.* 293, and 77 *Ala.* 176; *Dorsey v. St. Louis Railroad Co.*, 18 *Ill.* 65; *Southern R. R. Co. v. Reeves*, 64 *Ga.* 492; *Lydick v. B. & O. Railroad Co.*, 17 *W. Va.* 427; *Norfleet v. Cromwell*, 16 *Amer. Rep.* 787.

The thing to be done by the covenantor in this case related to the land, and, being annexed to it, the assignee, by accepting possession of the land, became bound by the covenant, as one running with the land, without being named in the agreement. *Fulton v. Stuart*, *supra*; *Taylor on Landlord & Tenant*, § 437; *Spencer's case*, above cited; *Morse v. Aldrich*, 19 *Pick.* 446; 1 *Add. Contracts*, *Morgan's ed.*, § 455.

There is a class of cases, unlike the present, in which courts of equity intervene for the establishment and enforcement of easements, whether created by deed or covenant, by assuming jurisdiction in the nature of that for specific performance. These we do not propose to discuss, but merely observe, that equity will enforce easements or servitudes of this nature, against purchasers with notice, as a burden or charge on the

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servient estate, although the plaintiff could not sue at law upon the covenant creating such servitude; in other words, even though the covenant does not, in the strict sense of the term, "run with the land."—*Trustees v. Lynch*, 70 N. Y. 449, or 26 Amer. Rep. 615; *Pomeroy's Equity*, §§ 692, 1303, 1347; 3 *Parsons on Contracts*, 353, note *k*.

The averments of the complaint were sufficiently certain to recover nominal damages for the alleged breach of covenant; and this would be sufficient on demurrer. We need not, therefore, discuss the other assignments of error.

The court below erred in sustaining the demurrer to the complaint; and the judgment must be reversed, and the cause remanded.

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*Bill in Equity by Bondholders, to enforce Equitable Mortgage on Railroad.*

1. *Consolidation of railroad companies; provisions preserving rights and remedies of creditors, but authorizing sale of property by new company.*—By the 5th section of the act ratifying the consolidation of the Alabama and Florida Railroad Company and the Mobile and Great Northern Railroad Company, under the name of the Mobile and Montgomery Railroad Company, the new company was authorized to issue bonds, secured by mortgage or deed of trust "on the road, franchises and property of said company;" while the 6th section, after declaring that the consolidation "shall in no way affect the rights of the creditors of said [original] companies, and their separate existence shall be continued as to all the rights and remedies of creditors," further provided, that the new company "may dispose of any property, real or personal, held by each of said [original] companies, and make and execute titles for the same." *Held*, that this power of sale was confined to such property as was not needed for operating the road—surplus lands, and probably personal effects not in present use, nor required for use on the road—releasing such property only from the charge or incumbrance of existing debts, and permitting it to be utilized.

2. *Commercial bonds or paper; protection to purchaser.*—A purchaser of negotiable bonds, or other commercial paper, in good faith, for valuable consideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title, or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage, or other security, given for such commercial paper or bond.

3. *Protection to purchaser of property, or of non-commercial paper.*—On a purchase of property, or of non-commercial paper, information or notice of any fact or circumstance calculated to excite suspicion, and which,



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if followed up, would lead to the discovery of a latent equity or defect of title, is the equivalent of actual notice.

4. *Purchasers from corporation.*—Persons dealing with a corporation are required, at their peril, to inform themselves of the fact that it has a legal existence, and of the extent of the powers conferred by its charter; and they are chargeable with notice of every fact which would be disclosed by the act of its incorporation, or other acts therein referred to.

5. *State-indorsed railroad bonds; rights of purchasers, as against prior equity, or unrecorded mortgage.*—The bonds issued by the M. & M. Railway Company, under the authority of the act approved February 25th, 1870, and indorsed by the governor in the name of the State, purporting on their face to be first-mortgage bonds, and referring to the said statute, which required that the first million and a half of said bonds should be used only in purchase and exchange for the bonds of the M. & M. Railroad Company, to whose rights and property said M. & M. Railway Company had succeeded; but containing no reference to the act of August 5th, 1868, under which said M. & M. Railroad was incorporated, by the consolidation of the A. & F. Railroad Company and the M. & G. N. Railroad Company, nor to the charge and incumbrance thereby declared in favor of the creditors of said original companies; and being put on the market for sale, with the State's indorsement; a purchaser might well rely on their recitals, presume that all the requirements of the statute had been complied with, and claim protection against any prior lien or equity in favor of the State or said M. & M. Railway Company. But the acts of the officers and agents of the State, and of said railway company, could not affect the rights of the creditors of said original railroad companies, as preserved and secured by the terms of the consolidation, they not being parties to the chancery suit foreclosing the mortgage, under which said new railway company derived title; and the charge in favor of said creditors being expressly declared by said act of incorporation and consolidation, a purchaser of said new bonds is chargeable with notice of it, although a mortgage securing said debts, as recited in the agreement of consolidation, may never have been recorded, or in fact never existed.

6. *Confederate currency, as consideration for purchase of railroad bonds.*—Railroad bonds, issued in 1862-3, and sold for Confederate currency, being enforced as an equitable mortgage against subsequent purchasers of the railroad franchise and property, the plaintiff's recovery is limited to "the purchasing value of the currency thus paid, at the time of the purchase, with interest on that value."

APPEAL from the Chancery Court of Montgomery.

Heard before Hon. JOHN A. FOSTER.

The bill in this case was filed on the 13th June, 1882, by Samuel Spence and E. H. Muse, against the Mobile and Montgomery Railway Company, the Louisville and Nashville Railroad Company (as lessee, and in possession of the road and other property of said former corporation), and the Alabama and Florida Railroad Company; and sought to declare and enforce, as a lien and charge on the property which had once belonged to the railroad company last named, and which the other companies claimed and held as derivative purchasers from it, two bonds which the complainants held, and which had been issued by said Alabama and Florida Railway Company. The bonds were signed by the president and treasurer of said railroad corporation, numbered 4 and 5, purported to be part of an

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“issue of \$300,000 to fund floating debt of company,” and in the following form: “On the first day of July, 1872, the Alabama and Florida Railroad Company of Alabama will pay to the bearer of this bond, at the Georgia Railroad and Banking Company, Augusta, Georgia, the sum of one thousand dollars, with interest thereon from this date, payable semi-annually, at the rate of eight per cent. *per annum*, on surrender of the annexed warrants, or coupons; and to secure which a third mortgage has been executed on the road, outfit, and lands of the company. In witness whereof, the president and treasurer of said company have signed this bond, and the seal of said company has been hereunto affixed, at Montgomery, Alabama, this 1st day of July, 1862.”

Attached to each bond were twenty coupons, each for \$40 interest, payable to bearer, on the first day of January and July in each year, at the office of said Georgia corporation. The complainants alleged, in their bill, that said bonds “were secured, as they purported on their face to be, by a mortgage on the road, outfit and lands of said company, and were negotiated and disposed of as such;” that complainants “now are and were *bona fide* owners and holders of said bonds, for a valuable consideration, at and before the time when the road, outfit and lands of said railroad company went into the possession of the said Mobile and Montgomery Railway Company; that said last named company took possession of said property with notice of the issue of said bonds, and that all of them had not been paid; and orators aver that said bonds were and are a first lien upon said property, and the same is now liable for the payment thereof.” The bill stated the facts, which are also stated in the opinion of the court, showing the incorporation of the Mobile and Montgomery Railroad Company, which was formed by a consolidation of the said Alabama and Florida with the Mobile and Great Northern Railroad Company, the rights and remedies of the creditors of each of the old corporations being expressly declared and preserved by the 6th section of the act authorizing the consolidation and incorporation under the new name; and that all of the said series of bonds, except the two held by the complainants, had been paid and taken up, either by the Mobile and Montgomery Railroad Company, its successor, the Mobile and Montgomery Railway Company, or the Louisville and Nashville Railroad Company, after its lease of the road. The prayer of the bill was, “that a decree be rendered establishing the said bonds and coupons as a lien upon the road, outfit and lands, which were formerly owned by the Alabama and Florida Railroad Company, and which, by the terms of consolidation, passed into the possession of the said Mobile and Montgomery Railroad Company, and afterwards into

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the possession of the Mobile and Montgomery Railway Company, and into the possession of the Louisville and Nashville Railroad Company as lessees; and that the same be sold for the payment of the amount found to be due on said bonds and coupons; or for such other and further relief as may seem meet and proper."

An answer to the bill was filed by the Mobile and Montgomery Railway Company, which was adopted by the Louisville and Nashville Railroad Company; admitting the incorporation of the Alabama and Florida Railroad Company, its ownership of the road, outfit and lands, as alleged in the bill, and its consolidation with the Mobile and Great Northern Railroad Company into a new corporation, called the Mobile and Montgomery Railroad Company; but alleging that, at the time of the consolidation, each of the old corporations was insolvent, and its property was subject to liens and mortgages far exceeding its value. As to the bonds held by the complainants, and other bonds of the same series, the answer contained these statements: "Respondent does not know, and can not admit or deny, that said bonds purported to be secured by a third mortgage, or were negotiated and disposed of as secured by a third mortgage on the road, outfit and lands; but respondent states, that no mortgage, or other instrument, was ever executed to secure said bonds, or either of them, and that the third mortgage mentioned in said bonds was never made or executed. Respondent is not advised as to how many of said bonds were taken up by the Alabama and Florida Railroad Company, or by the Mobile and Montgomery Railroad Company; but some of them, amounting to about \$40,000, were presented to this respondent as constituting a lien on the property of the said two railroad companies which passed into the hands of this respondent; and respondent denies that said bonds constituted any lien or charge on said property. Afterwards, in compromise and adjustment of said claim, respondent purchased said bonds, at a sum considerably less than the amount of the principal and interest thereof; but the Louisville and Nashville Railroad Company has never purchased, nor otherwise taken up any of said bonds. Respondent admits that said two bonds, the foundation of this suit, were not taken up or paid, but denies that they constitute any lien or charge upon the property in the hands of this respondent. Respondent does not know how complainants became possessed of said bonds, or what they paid for the same, or whether they were *bona fide* owners and holders at the time said road and property passed into the possession of this respondent; and respondent expressly denies that it took possession of said property with notice, actual or constructive, of the issue of said bonds, or



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that all of them had not been paid." The answer further stated, by way of plea, that said bonds were issued in July, 1862, and were purchased by complainants for Confederate currency, which was then only worth about fifteen dollars for one; and insisted that the complainants, if entitled to recover at all, should only recover their actual value in good money at that time.

The answer also stated, at length, the facts connected with the issue of bonds by the Mobile and Montgomery Railroad Company, secured by a mortgage on its road and property, and indorsed by the State, the foreclosure of that mortgage under a decree in chancery, the purchase for the benefit of the bondholders, and their subsequent incorporation under the name of the Mobile and Montgomery Railway Company; but, these facts being fully stated in the opinion of the court, it is not necessary to repeat them here. One of the bonds of the Mobile and Montgomery Railroad Company was made an exhibit to the answer; and it is referred to in the note of the testimony, but is not incorporated in the transcript. By agreement of counsel, entered of record, all of the acts incorporating the several railroad companies, and the other acts referred to in the opinion of the court, are to be deemed a part of the record.

On final hearing, on pleadings and proof, the chancellor dismissed the bill, holding that the Mobile and Montgomery Railway Company was not chargeable with notice, actual or constructive, of any lien or charge in favor of the complainants, on the property which had once belonged to the Alabama and Florida Railroad Company. The chancellor's decree is now assigned as error.

SAYRE & GRAVES, for appellants.—By the terms of the agreement for the consolidation of the A. & F. Railroad Company and the M. & G. N. Railroad Company, and the legislative act authorizing and effecting the consolidation of the two companies under a new name, the rights of the creditors of the old companies were expressly reserved; the property of the old companies passed into the possession of the new company, charged with the payment of all the debts then existing against it; and all the powers granted to the new company, as to the sale or other disposition of the property acquired under the consolidation, were restricted and made subject to the reserved rights of creditors. The reservation is in favor of all creditors, whether secured or unsecured; and it is therefore immaterial whether the complainants' debts were, or were not, in fact secured by a mortgage, as recited in the terms of consolidation, and shown by the evidence; and it is equally immaterial

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whether or not the mortgage was ever recorded. The act of consolidation is the charter of the new corporation, and all persons dealing with it are charged with notice of all its recitals and provisions, as also of other legislative acts therein referred to. Persons dealing with a corporation are bound, at their peril, to inquire into and ascertain the fact of its corporate existence, and the extent of its powers; and purchasers of property from it are chargeable with notice of every deed or other instrument which constitutes a link in the chain of title, and are put on inquiry, just as purchasers from a private person. Nothing that was done, and nothing that could have been done, by and between the new company, the trustees appointed in its new mortgage, and the purchasers at the sale made by the trustees, could take away or affect the reserved rights of the old creditors; nor could they be injured by the State's participation in any of those acts or proceedings. The character of the paper secured by a mortgage, or deed of trust, whether commercial or non-commercial, does not affect the title to the property conveyed, or the rights of a purchaser of that property. If the mortgagor had no title to the property, or if other persons had valid claims on it, a purchaser at the mortgage sale acquires no superior right or title, because the secured debt was evidenced by commercial paper. In support of these propositions, see *M. & W. P. Railroad Co. v. Branch*, 59 Ala. 153; *Jones on Railroad Securities*, §§ 73-75, 363; *Le Neve v. Le Neve*, 2 White & Tudor's L. C. Eq. 152-60; *Jackson v. Caldwell*, 1 Cow. 642; *Grand Lodge v. Waddell*, 36 Ala. 313; *Marks v. Cowles*, 61 Ala. 305; *Casey v. Holmes*, 10 Ala. 786; *McMullen v. Read*, 60 Ala. 572; *Johnson v. Thweatt*, 18 Ala. 747; *Pearce v. Railroad Co.*, 21 How. 443; *Comm'rs v. Aspinwall*, 21 How. 545; *Green's Brice's Ultra Vires*, 429, note 397, 159; *Ang. & A. Corp.*, § 299.

THOS. G. JONES, and WATTS & SON, *contra*.—(1.) The complainants, under the pleadings and proof, are only simple-contract creditors of the A. & F. Railroad Company, having no mortgage lien; and if they ever had a mortgage, it was never recorded, as required by law, and is therefore inoperative as against subsequent creditors and purchasers. (2.) If they have an equity, it grows out of the legislative act consolidating the two railroad companies; and this equity, though prior in point of time, can not prevail against the junior equity of the defendants, coupled with their possession and legal title, acquired by their purchase under the decree of foreclosure.—2 Story's Equity, § 1503; 2 L. C. Eq. 102; 5 H. L. Cases, 905; *Dixon v. Brown*, 53 Ala. 430; *Johnsonbury v. Morrill*, 55 Vt. 165-70. (3.) The rights and equities of the defendants accrued

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on their purchase of the bonds of the new railroad company; and the bonds being negotiable, and purchased for value, in good faith, before maturity, without knowledge or notice of any outstanding equity, the purchasers are entitled to protection, if, under any circumstances, the railroad company could make a mortgage which would bind the property.—*Knox Co. v. Aspinwall*, 21 How. 539; 92 U. S. 490; Dill. Mun. Corp., § 419; *State v. Cobb*, 64 Ala. 127; *Gelpke v. Dubuque*, 1 Wallace, 203. (3.) The legislative act consolidating the two railroad companies, and creating another corporation under a new name, preserved the rights and remedies of creditors, but conferred no new rights on them, nor created any statutory mortgage on the property, in favor of unsecured creditors, as against subsequent *bona fide* purchasers; and it expressly authorized the new company to issue bonds, “to secure the same by mortgage or deed of trust on the road, franchises and property of said company,” to “dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same.” If the A. & F. Railroad Company had executed a mortgage on its property, the complainants, as unsecured creditors, could not have complained of it; nor can they complain of a mortgage executed by the new company, conveying property on which they had no lien. (4.) In *M. & W. P. Railroad Co. v. Branch*, 59 Ala. 154, cited for appellants, there was no question as to a *bona fide* purchase for value without notice; and therein that case is distinguishable from this. *Miss. Valley Co. v. Chicago Railroad Co.*, 58 Miss. 846, or Amer. & Eng. R. R. Cases, 575. (5.) If the purchasers of the new bonds are chargeable with notice, not only of the legislative act of consolidation, but also of the proposition to consolidate as shown by the resolutions; then they would also have learned, and must be presumed to have known, that complainants’ debts were for “third-mortgage bonds, issued in 1862, for Confederate money;” which, as settled by the decisions of this court at that time in force, were without consideration, and could not be enforced in the courts.—*Hale v. Houston*, 44 Ala. The subsequent change in the decisions of this court, as to the validity of such bonds, can not operate retrospectively, to the prejudice of the defendants’ rights.—*Hardigree v. Mitchum*, 51 Ala. 151. (6.) The averments of the bill are not sufficient to place the complainants in the attitude of *bona fide* purchasers for value.—*Walker v. Ledbetter*, 31 Ala. 175; *Buford v. McCormick*, 57 Ala. 428; *Gresham v. Ware*, at present term, *ante*, 192. (7.) The complainants are estopped by their long silence and negligence, while the defendants were expending thousands of dollars in repairing and improving the property which they had bought in good faith, from now as-



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serting any unknown lien or equity they may have once had. *Kent v. Mining Co.*, 78 N. Y. 187; 60 Penn. St. 319; 78 Penn. St. 391; *Pomeroy's Equity*, § 818.

STONE, C. J.—Two railroad corporations—the Alabama and Florida Railroad Company of Alabama, and the Mobile and Great Northern Railroad Company—had separate meetings of their stockholders, and at such separate meetings, each of said corporations agreed to a common basis of consolidation, submitted to them, by which they became one corporation under the new name, “The Mobile and Montgomery Railroad Company.” The proposition, thus submitted and acted on, contained a statement of what purported to be the financial condition of each of the corporations. The Alabama and Florida Railroad Company was reported as owing first and second mortgage debts amounting to about eleven hundred thousand dollars, a third mortgage debt of three hundred and fifty thousand dollars, and a floating debt. The mortgage debts were evidenced by coupon bonds, in the form of commercial paper, and were secured by mortgages on the railroad and its property, as was expressed on the face of the bonds. The third mortgage bonds were issued during the civil war, and, it is alleged, were sold for Confederate money. The report and proposition so made to the two companies, and acted on by them, was in writing, and, together with the action of the two corporations thereon, was spread on the records of the Alabama and Florida Railroad Company. This record showed the statement of the debts above referred to, and the book containing it became the record book of the Mobile and Montgomery Railroad Company, from that time forth. In the proposition for consolidation, thus submitted and acted on, it was proposed that, after the consolidation should be perfected, the new corporation should issue new coupon, commercial bonds, secured by mortgage on the consolidated road, for the purpose, in part, of paying the debts of the old corporations, and, in part, to provide a fund for the repair and completion of the consolidated road. All these propositions were agreed to, at the several stockholders’ meetings. On the 5th day of August, 1868, the act was approved “to consolidate and make joint stock of the Mobile and Great Northern Railroad Company, and the Alabama and Florida Railroad Company of Alabama, and to change the name of said companies to the Mobile and Montgomery Railroad Company.”—Sess. Acts, 1868, p. 82. By said act it is declared, “That in accordance with the action of the stockholders of the Alabama and Florida Railroad Company, of Alabama, at the convention held on the 10th day of March, 1868, and with the action of the stockholders of the

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Mobile and Great Northern Railroad Company, at their convention held on the 13th and 14th days of March, 1868, full authority is hereby given to said companies to make joint stock of the stock of the two companies, and to consolidate said companies into one corporation, by the corporate name of the Mobile and Montgomery Railroad Company." The act also conferred on the new company the franchises and property-rights of the old companies, and authorized the new company "to issue bonds, payable at such times and places, and bearing such rate of interest as they may deem desirable, and to secure the same by mortgage or deed of trust on the road, property and franchises of said company," and to dispose of the bonds, *etc.* The sixth section of said act is in the following language: "That the consolidation of the said Alabama and Florida Railroad Company with the said Mobile and Great Northern Railroad Company, and the change of the name of the said companies, as provided for in the foregoing sections of this act, shall in no way affect the rights of the creditors of the said companies, and their separate existence shall be continued as to all the rights and remedies of creditors, and the president of said Mobile and Montgomery Railroad Company shall be held in law, as to service of process, as the president of the said Alabama and Florida Railroad Company, and of the Mobile and Great Northern Railroad Company; and the said Mobile and Montgomery Railroad Company may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same, and may sue for and recover in its name all debts, dues and demands, of every kind and description whatever, due to each of said companies."

Under the statute of August 5th, 1868, the Mobile and Montgomery Railroad Company, having organized, issued its commercial coupon bonds to the amount of two and a half millions; and, to secure their payment, executed to trustees a mortgage, conveying to them, for such purpose, the franchise and all the property of said Mobile and Montgomery Railroad Company. The bonds so issued were put on the market, and sold to purchasers. The *bona fide* sale of these new bonds is not questioned, nor is any question raised on the sufficiency of the consideration paid for them.

The Mobile and Montgomery Railroad Company made default in the payment of its interest on said coupon bonds, and thereupon the trustees sought and obtained, by bill in chancery, a foreclosure of said mortgage. Neither the Alabama and Florida Railroad Company, the Mobile and Great Northern Railroad Company, nor any of the creditors of either, were made parties to said suit. Under a decree rendered in said cause, the franchise and entire property of the Mobile and

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Montgomery Railroad Company was brought to sale, and the trustees became the purchasers, in trust for the bondholders. The latter thereupon incorporated themselves, under the corporate name of the "Mobile and Montgomery Railway Company." The present suit is against the last named corporation, and is prosecuted by third mortgage bondholders of the Alabama and Florida Railroad Company,—their bonds not having been paid. The purpose of the suit is, to subject to the payment of their said claim that portion of the consolidated road which was originally the property of the Alabama and Florida Railroad Company. Their suit is rested on the sixth section of the act approved August 5th, 1868, and on the report and proposition submitted, on which the consolidation proceedings were had by the original companies.—*M. & W. P. R. R. Co. v. Branch*, 59 Ala. 139.

Section 6 of the act ratifying the consolidation provides, that such consolidation "shall in no way affect the rights of the creditors of such companies, and their separate existence shall be continued as to all the rights and remedies of creditors." Immediately in connection with this provision, and separated from it only by a comma, is this language: "And the said Mobile and Montgomery Railroad Company may dispose of any property, real or personal, held by each of said companies, and make and execute titles for the same." It is contended, that this second clause confers a right to sell the entire road and property; and when so sold, the liability resting on the original roads, for their unpaid debts, would necessarily cease. This, it is claimed, distinguishes this case from *M. & W. P. R. R. Co. v. Branch*, *supra*. There are several reasons why we can not adopt this interpretation. It would render almost, or quite nugatory, the connected clause which preserves and continues the old corporations, so far as their debts are concerned. It would be somewhat a duplication of the power, conferred by the fifth section, to make a "mortgage or deed of trust on the road, property and franchises of the company." It authorizes the sale of only real and personal property, saying nothing of the franchise, while the fifth section expressly authorizes the mortgage of the franchise. We should so construe the statute, as to give to each clause some operation, if we can. We accomplish this object by holding, as we do, that the authority to sell and convey real and personal property which had belonged to the original corporations, was confined to such property as was not needed for running or operating the road, surplus lands, and probably personal effects, not in present use, nor required for use on the road. The clause immediately preceding had fastened a charge. This was intended to release the property not needed, and also "dues and demands of every kind



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and description," from that charge and incumbrance, and permit them to be utilized.

The important question in this case arises out of the inquiry, Were the purchasers of the bonds, known as first-mortgage bonds of the Mobile and Montgomery Railroad Company, chargeable with notice of this prior incumbrance or charge, resting on that part of the consolidated road, which was formerly the Alabama and Florida Railroad Company of Alabama? If they were, then the complainant in this case is entitled to recover. Otherwise, not. We may premise, that the proof fails to show satisfactorily that the alleged third mortgage of the Alabama and Florida Railroad Company was ever executed, although there is some proof pointing in that direction. But, if executed, there is a failure of proof that it was ever recorded. This, however, is immaterial. The presentsuit claims relief in equity; and if the purchasers of the consolidated road's bonds are chargeable with notice of the liability resting on the original roads, as preserved by the act of consolidation, then such purchasers can not claim the immunity which purchasers, in good faith, of commercial paper can assert. This would leave the third-mortgage bonds of the Alabama and Florida Railroad Company an equitable charge on that part of the consolidated road.—*White Water Valley Co. v. Valleth*, 21 How. U. S. 414; *Young v. M. & E. R. R. Co.*, 2 Woods, 606; *Jones' Eq. Mortgages*, § 73; *Miller v. R. & W. R. R. Co.*, 36 Ver. 452; *M. & W. P. R. R. Co. v. Branch*, 59 Ala. 139.

The rules as to notice, sufficient to charge a purchaser of commercial paper before maturity, are widely different from those which obtain in the purchase of property and of non-commercial paper. "A purchaser of negotiable bonds before due, for a valuable consideration, in good faith, and without what is equivalent to *actual* knowledge or notice of a defect of title, holds them by a title valid as against every other person. Even gross negligence at the time of purchase does not, alone, defeat the purchaser's title. A purchaser may have had suspicion of a defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man; or he may have disregarded notices of stolen bonds; and yet, if he has purchased for value in good faith, his title can not be impeached. . . . It must be shown that he did not purchase honestly."—*Jones' Railroad Securities*, § 207; 2 Danl. Negotiable Instruments, §§ 1502-3; *Murray v. Lardner*, 2 Wall. 110; *Galveston R. R. Co. v. Cowdry*, 11 Wall. 459; *St. John Township v. Rogers*, 16 Wall. 644. And when a negotiable bond, or other negotiable instrument, is thus purchased, a mortgage given to secure its payment is alike protected against latent defenses, as is the instrument it is intended

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to secure. Such negotiable instruments—particularly railroad bonds—derive their strength, solvency, and negotiability, from the mortgaged railroad which puts them on the market. Withdraw from them this support, and their negotiability at once perishes.—*Hawley v. Bibb*, 69 Ala. 52; *Carpenter v. Logan*, 16 Wall. 271; *Kennicott v. Supervisors*, 16. 452; 1 Jones' Mort. § 834; 1 Hilliard Mort. 526; 1 Danl. Neg. Instr. § 834; *Taylor v. Page*, 6 Allen, 86; *Martineau v. McCollum*, Chand. (Wis.) 153; *Cornell v. Hickens*, 11 Wis. 353; *Pierce v. Farmer*, 47 Me. 507; *Cicoth v. Gagnin*, 2 Mich. 381; *Blower v. Henderson*, 8 Mich. 394; *Potts v. Blackwell*, 1 Jones' Eq. 58; *Fisher v. Otis*, 3 Chand. 53; *Croft v. Bunterm*, 9 Wis. 503. See also, *Town of Colona v. Eaves*, 92 U. S. 484; *Bissell v. City of Jeffersonville*, 24 How. 287; *Moran v. Com'rs*, 2 Black, 722; *City of Elizabeth v. Force*, 29 N. J. Eq. 587; *Deming v. Inhab. of Holton*, 18 Am. Rep. 253, and note.

Two States—Ohio and Illinois—depart from the general ruling, which extends the immunity accorded to negotiable instruments to the mortgages given to secure their payment. *Bailey v. Smith*, 14 Ohio St. 396; *Kleeman v. Frisbie*, 63 Ill. 462. And in 2 Pom. Eq. § 708, n. 1, the reasoning of these cases is commended. Our ruling in *Hawley v. Bibb*, *supra*, is supported by the great weight of authority.

The rule in regard to purchasers of property is, that any information or notice to the purchaser, of any fact or circumstance calculated to excite suspicion, and which, if followed up, will lead to a discovery of the latent equity, or defect of title, is the equivalent of actual notice.—*Le Neve v. Le Neve*, 2 Lead. Cas. in Eq. 35; *Milhous v. Dunham*, 78 Ala. 48; *Hodges v. Coleman*, 76 Ala. 103; *Dudley v. Witter*, 46 Ala. 664; *Marks v. Cowles*, 61 Ala. 299; *Center v. P. & M. Bank*, 22 Ala. 743; *Wilson v. Wall*, 34 Ala. 288.

The bonds issued by the Mobile and Montgomery Railroad Company, as we have shown, were put on the market and sold, and the holders of them had the mortgage foreclosed, the railroad, its equipment and franchise sold, and themselves became the purchasers. It is not pretended they had actual notice of the charge left on the consolidated road, by the agreement and act of consolidation. The bonds under which the later corporation, the Mobile and Montgomery Railway Company, asserts title, expressly refer to the statute "to authorize the governor of the State of Alabama to indorse, on the part of the State, the first mortgage bonds of the Mobile and Montgomery Railroad Company," approved February 15th, 1870.—Sess. Acts, 1869–70, p. 175. They also refer to the mortgage, on its face styled a first mortgage, made to secure the payment of said bonds. Neither the mortgage nor the bonds make any

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reference to the act of consolidation and incorporation of August 5th, 1868, stated above. The later act makes no allusion to the charge left on the original roads by the agreement made part of the act of consolidation. By its terms and provisions, it is shown that one million five hundred thousand dollars of these bonds were designed and set apart specially to "first pay off, satisfy, and discharge all the existing liens on the said railroad, outfit and equipment, so that the State of Alabama shall have a first and only lien on the said railroad, outfit and equipment." Other provisions of the statute are such that the said million and a half of bonds could only be used in paying the old indebtedness resting on the road; and the bonds could only be delivered by the governor, in performance of an agreed arrangement, by which the new, indorsed bonds were to be given in exchange for the old. If these statutory requirements had been faithfully adhered to, not a dollar of these first million and a half of bonds would have passed from the governor's hands, except in exchange for old indebtedness, until that entire indebtedness was taken up; and the last of said million and a half could be delivered only when the outstanding, old indebtedness had been cancelled within one hundred thousand dollars of its full amount. And by the second section of said act it is provided, that "Whenever the governor of the State of Alabama is satisfied that all of the existing liens on the said railroad, outfit and equipment have been discharged, and the State of Alabama has a first and only lien on the said railroad, outfit and equipment, and satisfactory evidence is submitted to him that the said Mobile and Montgomery Railroad Company have let out, to good and responsible parties, the building of their road from its present terminus at Tensas to the city of Mobile, the governor is hereby authorized and required to indorse, on the part of the State of Alabama, the other one million of dollars of the first-mortgage bonds of the said railroad company." By these provisions it will be seen that, until the entire old indebtedness on the road was cancelled, the last million of the bonds could not be indorsed; and the first million and a half could only be surrendered by the governor, in liquidation of the old lien indebtedness. The entire two and a half millions were indorsed by the governor, delivered to the railroad officials, and sold in the market. It was the governor's duty to satisfy himself by proof that all these conditions were complied with, before he was authorized to surrender the bonds. Finding the bonds in market, each having the governor's indorsement, the purchasing public was justified in inferring that all conditions precedent had been complied with; that the entire old debt had been cancelled, and that the mortgage security was what its face, the bond, and the statute all



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declared it was, a first mortgage. This, if there be nothing else, placed the bondholders on the high vantage-ground of purchasers of commercial paper, without notice.—*Mercer County v. Hackett*, 1 Wall. 83; *Van Hostup v. Madison City*, 16. 291; *Supervisors v. Schenck*, 5 Wall. 772; *Belo v. Comm'rs Forsythe Co.*, 76 No. Car. 489; *Comm's Knox Co. v. Nichols*, 14 Ohio St. 260; *Com. Mut. Life Ins. Co. v. C. C. & C. R. R. Co.*, 41 Barb. 9; *Welch v. Sage*, 47 N. Y. 143; *N. O. J. & Gr. Nor. R. R. Co. v. Mississippi College*, 47 Miss. (5 Morris) 560.

But there is another view of this question. Corporations are artificial persons, and, with us, exist only by positive law. They are the creatures of special statutory enactment, or of incorporation under some general law, conferring the authority. All persons dealing with them are burdened with the duty of informing themselves that they have a legal existence, and that they are clothed with the powers they propose to exercise. Being bound to inform themselves of the extent of the corporate powers, they must needs examine the act of incorporation which confers the powers. Like the investigator of a land title, they must examine all the links in the chain, and are charged with knowledge of any fact such examination would disclose.—*Dudley v. Witter*, 46 Ala. 664. Examination of the act of incorporation in this case would have disclosed the fact, "that the consolidation of the said Alabama and Florida Railroad Company, with the said Mobile and Great Northern Railroad Company, and the change of the name of the said companies, as provided for in the foregoing sections of this act, shall in no way affect the rights of the creditors of said companies, and their separate existence shall be continued as to all the rights and remedies of creditors." The bond purchasers, then, must be held to have known of these old debts which incumbered the property.—*Board of Com'mrs v. Aspinwall*, 21 How. U. S. 539; *Com. Mut. Ins. Co. v. C. C. & C. R. R. Co.*, 41 Barb. 9, 27; *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton Co.*, 10 Wall. 676; and authorities on brief of counsel.

It must be confessed that this is a very hard case. The bonds were issued as first mortgage bonds, under the act approved February 25th, 1870. That act gave no notice of any debt, which could be outstanding when the bonds were offered for sale; for, by the very terms of the act, the offer of the bonds for sale was an official certification, by the State's executive head, that all prior liens and incumbrances on the road had been paid and cancelled. There was no authority for delivering the bonds until such payment had been made. The bonds referred to this statute, as an authority for their issue;

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and referred to the mortgage as a *first* mortgage, to secure their payment. Well might the bond-purchasers feel secure in the belief that the bonds, for which they parted with their money, had a first and only lien on the road and its property, for their ultimate payment.

All these, however, were the acts of the railroad's officials and the State's officers. The holders of the claims against the two original corporations, preserved by the act of consolidation, were not consulted, took no part in the issue or sale of the new bonds, or in the giving of the mortgage, and hence can not be concluded by anything that was done. The agreement and act of consolidation had left their claims a charge on that part of the consolidated road which had been known as the Alabama and Florida Railroad of Alabama, and they had done nothing to waive or cancel the charge. The legislature could not, without their consent, deprive them of this right.—*Caylus v. N. Y., K. & S. R. R. Co.*, 10 Hun, 295; *Com. of Va. v. State of Maryland*, 32 Md. 501; *Wilkinson v. Leland*, 2 Pet. 657; *Sadler v. Langham*, 34 Ala. 311.

What we have said relates to the bonds outstanding against the Alabama and Florida Railroad Company, at and before the act of consolidation. Their payment was secured by an equitable mortgage. We decide nothing as to the non-secured debts.

If the bonds sued on in this case were sold for Confederate currency, the recovery should be for only the purchasing value of the currency thus paid, at the time of the purchase, with interest upon that value.—*Thorington v. Smith*, 8 Wall. (U. S.) 1.

Reversed and remanded.

## **Morton & Bliss v. New Orleans & Selma Railway Company and Immigration Association.**

*Bill in Equity by Judgment Creditor of Insolvent Railroad Corporation; Cross-Bill between Holders of State-Indorsed Bonds.*

1. *Amendment by adding or striking out parties, under statutory provision.*—The statute authorizing amendments in chancery, at any time before final decree, “by striking out or adding new parties” (Code, § 3790), is very liberal in its provisions, and confers a right which, in a proper case, is not matter of discretion with the chancellor; but it is not

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to be construed as authorizing, in every case, as matter of right, the introduction by amendment of new parties who, by purchase or voluntary assignment *pendente lite*, have acquired an interest in the subject-matter of the suit.

2. *Purchase pendente lite; substitution of trustee.*—A purchaser of property *pendente lite* takes it subject to the hazards of the pending litigation, and is bound by any decree afterwards rendered; and this rule applies with special force where a new trustee is substituted by the voluntary act of the parties, without the sanction of the court, pending a suit to enforce the trust.

3. *Judgment creditor of insolvent corporation; may come into equity, when.*—A judgment creditor of an insolvent corporation, having an execution returned no property found, may file a bill in equity to reach and subject equitable assets, to remove incumbrances which prevent the enforcement of his judgment at law, and to determine the validity of liens on the property asserted under the incumbrance.

4. *Same; cross-bill between bondholders.*—The original bill being filed by a judgment creditor of an insolvent railroad corporation, which had conveyed all of its property to trustees for the benefit of the holders of certain mortgage bonds, the validity of which was assailed and denied by the complainant; a cross-bill between the several bondholders, claiming and asserting antagonistic interests under the deed of trust, is proper and necessary to adjust and settle their conflicting liens and priorities.

5. *State-indorsed railroad bonds, misapplied by railroad corporation; rights of holders.*—As held in this case on the former appeal (72 Ala. 566), the State-indorsed bonds of the New Orleans and Selma Railroad Company, issued to the company on the completion of the first twenty miles of its road, having been misapplied by it, in violation of the terms of the statute under which they were indorsed (Sess. Acts 1869-70, pp. 149-57), in payment of their debt to the contractor for work done in building said first twenty miles, the indorsement created no liability against the State, while the bonds remained in the hands of the contractor, or of any other person who was chargeable with notice of such misapplication; but, said bonds being negotiable instruments, and governed by the rules applicable to other negotiable paper, the State is liable, as an accommodation indorser, to any *bona fide* holder who acquired the bonds for value, in the usual course of business, without knowledge or notice, actual or constructive, of their original misapplication.

6. *Same; who are purchasers for value, without notice.*—As to the bonds held by Gilman, Sons & Co. (58, of the 320 issued to the railroad company), and purchased by them from Crawford, to whom they were transferred by the contractor, the court holds, as on the former appeal (72 Ala. 566), that they are *bona fide* holders for value, without notice of the misapplication, although they bought the bonds, at par, in exchange for the bonds of a private construction company which were worth only about ten cents on the dollar; but, as to the bonds held by Morton, Bliss & Co., which were transferred to them by the contractor, in payment for the iron sold by them to him (and used by him in the construction and equipment of said first twenty miles of road), that they are chargeable with notice of the misapplication, and can not be deemed innocent purchasers.

7. *Same; right of holders under deed of trust.*—Of the holders of the 320 indorsed bonds issued by said railroad company, only those who are purchasers for value without notice are entitled to be subrogated to the statutory lien and priority of the State; but, as against the railroad company, which has waived the defense of a partial failure of consideration, and as against the complainant in the original bill, a subsequent judgment creditor of the railroad company, all are entitled to share in



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the security afforded by the deed of trust, and to have it enforced for their benefit.

8. *Creditors' bill to foreclose deed of trust; parties coming in under decretal order of reference.*—By the settled practice of courts of equity, under a bill to enforce and foreclose a deed of trust for the benefit of numerous creditors, the court may adjust equities and priorities of the different classes of creditors, as represented by the parties then before the court; and those who afterwards come in under the decree and order of reference, and prove their claims, can not complain that this was done before they were in court as parties.

9. *Negotiable bonds, with attached coupons due and unpaid; purchase in good faith, without notice.*—Negotiable bonds not due, with attached coupons past-due and unpaid, do not thereby appear dishonored on their face; but the presence of such unpaid coupons is a material circumstance bearing on the question whether the purchaser acquired them in good faith, and without notice.

10. *Commercial paper; when purchaser is entitled to protection.*—Mere suspicion on the part of a purchaser of negotiable paper, of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith, or something equivalent to it; and while gross negligence is not, of itself, bad faith, it may be evidence of it.

11. *Same; constructive notice; burden of proof.*—The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York; a purchaser having knowledge of such demand and refusal, at the time he acquired the bonds, can not claim to be an innocent purchaser without notice; but, when he has proved the payment of value, the *onus* of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title.

12. *Same; constructive notice by public statute.*—The statute approved February 21st, 1870, under which these railroads bonds were indorsed and provision made for their payment, and the repealing statute approved March 17, 1875, being public statutes, every purchaser and holder of the bonds is chargeable with knowledge of their provisions; and although the repealing statute may not amount to any open repudiation by the State of its liability as indorser (a point not decided), "it is sufficient to put a subsequent purchaser on inquiry, and to charge him with notice of the fact that there was something wrong about the bonds, especially when taken in connection with the other fact that, at the time of such repeal, the coupons for several years past-due and unpaid were attached to them."

[On rehearing, and petition for allowance of counsel fees.]

1. *Transfer of negotiable paper as collateral security.*—When negotiable coupon bonds, or other commercial instruments, are transferred as collateral security, for the repayment of money advanced on the faith of them, the holder should be permitted, on foreclosure of a deed of trust given to secure them and other bonds issued at the same time, to prove for the entire amount of the collaterals so held by him; but he can only recover the amount of his original debt, with lawful interest thereon.

2. *Same; allowance of counsel fees.*—Counsel fees incurred by the holder of bonds so transferred, in the suit to foreclose the deed of trust, not being a part of the debt for which the bonds were transferred as collateral security, can not be allowed as part of the amount for which they are entitled to prove, over and above the amount of their debt.

3. *Allowance of counsel fees out of funds in court.*—When a trust fund

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is brought into court, under a bill necessarily filed by a trustee to preserve the estate from waste or destruction, he is entitled to an allowance for reasonable counsel fees, as part of the necessary expenses of the suit; and when a creditor files a bill in equity, for the joint benefit of himself and other creditors, counsel fees are properly charged on the common fund brought into court, or apportioned among the several creditors who claim the benefit of the decree. But the principle can not be extended to a bill filed by a judgment creditor of an insolvent railroad corporation, seeking to set aside an assignment of its property by deed of trust for the benefit of certain bondholders, which deed is held valid, the bondholders allowed to come in and prove their claims, their equities and priorities adjusted, and the deed enforced and foreclosed for their benefit; though, after satisfaction of the claims adjudged to constitute a first lien on the property, the attorneys of creditors holding a second lien, who filed the cross-bill for the enforcement and foreclosure of the deed, may ask an allowance for reasonable fees out of the residue of the fund distributable among creditors holding a second lien.

4. *Distribution of fund among creditors; equitable rule distinguished from legal.*—In a court of equity, where equality as regarded as equity, the principle which prevails at law, as to the distribution of money among execution creditors, is not applied; but the money arising from the sale of property, under a decree foreclosing a deed of trust executed by a railroad company for the security of its bondholders, is distributed *pro rata* among the bondholders entitled to a first lien, and the residue among the bondholders entitled to a second lien, without regard to the time at which their several liens accrued.

APPEAL from the City Court of Selma, sitting in Equity.

Heard before the Hon. W. C. WARD, as special chancellor, selected by the parties on account of the disqualification of Hon. JONAS HARALSON, the presiding judge of the court.

The original bill in this case was filed on the 10th October, 1877, by Richard M. Robertson, a judgment creditor of the New Orleans and Selma Railroad Company and Immigration Association, a private domestic corporation, which was alleged to be insolvent; against the said corporation, and against T. H. DuPuy and others, who were alleged to be in possession of the property of said corporation; and against Gilman, Sons & Co., a firm doing business in the city of New York, as the claimants or holders of certain mortgage bonds which had been issued by said corporation; and against the Union Trust Company, a foreign corporation, organized and doing business in the city of New York, as the trustee in said mortgage. An amended bill was afterwards filed, bringing in as defendants the several persons composing the firm of Morton, Bliss & Co., a partnership doing business in the city of New York, and L. M. Barlow as the personal representative of the estate of David Crawford, deceased, alleged to be holders and claimants of other mortgage bonds of said insolvent corporation. The complainant obtained a judgment for \$45,000 against said corporation, in the Circuit Court of Dallas county, in January, 1874; but this judgment was set aside, on a subsequent day of the term,

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another judgment for \$12,176 rendered, and the case continued for further contest as to the residue of the claim; and in June, 1876, the contest resulted in another judgment in his favor, for \$17,478.20. Executions on each of these judgments were regularly issued, and returned "No property found," before the bill was filed. The object and prayer of the bill was to set aside the mortgage, as an incumbrance on the property of the corporation, which would prevent it from bringing an adequate price at a sale under execution at law; or to have the mortgage bonds, if any of them were lawful and valid claims against the property, declared inferior to the lien of the complainant's judgments, and to have the property sold in satisfaction of his debt, and of other valid debts or claims which might be presented and proved.

The defendant railroad corporation was chartered by an act of the General Assembly of Alabama, approved February 23d, 1866, and was authorized to build a railroad between Selma and New Orleans; and its name was changed, by adding the words "*and Immigration Association*," by another act, approved December 22d, 1868. The corporation was regularly organized under its charter, the complainant being a large stockholder and its first president. The first twenty miles of the railroad, beginning at Selma, were built under contract with said T. H. DuPuy, entered into on the 22d February, 1870; by the terms of which contract he undertook to construct the entire road, at an agreed compensation per mile of \$16,000 of the first-mortgage bonds of the corporation, indorsed by the State as then provided by law, and was to receive, in addition, certain cash subscriptions, shares of stock, &c. By the act of the General Assembly approved February 21st, 1870, it was provided that the bonds of a railroad company should not be indorsed by the State until twenty miles of its road were "completed, equipped and finished;" and that the bonds should then be indorsed for said twenty miles, to the amount of \$16,000 per mile, and to the same amount for each additional section of five miles as completed.—Sess. Acts 1869–70, pp. 149–56. On the 16th May, 1870, the contract between said DuPuy and the corporation was modified, and it was stipulated that his compensation should be, for the first twenty miles, \$16,000 per mile of the unindorsed bonds of the railroad company, in addition to certain subscriptions, shares of stock, &c.; and on the completion of the first twenty miles, as required by the said act of February 21st, 1870, the company agreed, "for the purpose of building and expediting the construction and equipment of the second section of twenty miles of said road, to advance and pay to the said party of the second part [DuPuy] \$320,000 in the mortgage bonds of said com-



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pany, indorsed by the State of Alabama," and at that rate for each continuous five miles.

On the 16th July, 1870, the railroad company executed to the Union Trust Company of New York, as trustee, a mortgage, or deed of trust, conveying its franchise, road and property, to secure bonds which it proposed to issue for the purpose of raising money, as recited in certain resolutions which were set out in full in the deed, "to enable this company to construct and equip its road beyond the first twenty miles, that much having been already provided for;" the bonds to be in a prescribed form, for \$1,000 each, payable on the 1st July, 1895, with interest at the rate of eight per cent. *per annum*, payable semi-annually, at the office or agency of the railroad company in the city of New York, "on presentation and surrender of the annexed coupons as they severally become due;" each containing on its face the words, "*To be indorsed by the State of Alabama,*" and a recital in these words: "This is one of a series of bonds, of like tenor, date and amount, numbered consecutively from one upwards, and limited to sixteen thousand dollars per mile of completed and equipped railroad in the State of Alabama; secured by a mortgage, bearing even date herewith, of the railroad, with its equipments and appurtenances, and franchises of the said corporation which relate thereto; issued under the provisions of an act of the General Assembly of Alabama, entitled 'An act to furnish the aid and credit of the State of Alabama for the purpose of expediting the construction of railroads,' approved February 21st, 1870; all secured by a first lien, provided for in said act, on the railroad of said company, its equipments, and all other property relating thereto, including the franchise of the company, with power of sale in case of default, and by indorsement of the State of Alabama, made under authority and in pursuance of the aforesaid act of the General Assembly." This mortgage contained a provision in these words: "If, at any time hereafter, the said party of the first part shall, after demand made, make default, refuse, neglect or omit, for any period exceeding ninety days, to pay the semi-annual interest on the bonds aforesaid, or any of them, then and in any such case the whole principal sum of each and all of the bonds intended to be hereby secured, together with all interest thereon, shall thereupon become forthwith due and payable."

Of the bonds provided for in this mortgage, 320 were issued, and were delivered to said DuPuy under his contract, but without the State's indorsement, before the completion of the first twenty miles of the road. In June, 1871, the first twenty miles having been completed, DuPuy re-delivered the bonds to the railroad company, in order that the State's indorsement

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might be procured; and the indorsement having been made, on proof of full compliance with the requisitions of the statute, they were again delivered to said DuPuy. These bonds were transferred by DuPuy to David Crawford and the persons composing the firm of Morton, Bliss & Co. of New York, in payment of debts which he had contracted with them for iron and other materials purchased and used in the construction and equipment of said first twenty miles of the road. No other bonds were issued by the company, and no further portion of the road was built; and this suit, under the pleadings, was resolved into a contest among the several holders of these bonds, claiming as purchasers or sub-purchasers under DuPuy.

On the 6th April, 1878, Morton, Bliss *et al.*, having answered the original bill, filed a cross-bill, "on behalf of themselves and all other creditors of the New Orleans and Selma Railroad Company and Immigration Association, who shall come in and contribute to the expense of this suit;" claiming to be the holders of 150 of the said bonds, which, as they alleged, they purchased in good faith, for full value, before maturity, and without notice of any defect in, or defense against them; asserting the validity of said bonds, and their right to priority of lien as against other creditors or incumbrancers, under the mortgage, and under the statutory lien; alleging their presentation of the coupons for payment on the 1st July, 1872, which was refused, whereby the bonds became due and payable by the terms of the mortgage; and praying relief as follows: 1. "That the validity and order of priority of the several and respective liens and claims of the parties to this action, upon and against the said railroad and other mortgaged property and premises hereinbefore described, may be determined and decreed." (2.) "That it may be ascertained, determined and decreed, who are the *bona fide* holders and owners of the bonds hereinbefore referred to; which are outstanding, and to what extent; and for what sums the same are valid obligations, or are secured by the said deed of trust and statutory mortgage hereinbefore referred to, and what are the rights respectively of the owners of said bonds." (3.) "That the said railroad and all the property embraced in and described or referred to in said deed of trust, including right of way, property, franchises, capital stock," &c., "be sold in such manner as this court shall direct." (4.) "That an account be taken in respect to the money due upon said bonds secured by said deed of trust and statutory mortgage, for principal and interest; that the holders thereof be ascertained; that the proceeds of sale be applied, under the direction of the court, to the payment and discharge of the said several sums; and that this suit and the said original suit may constitute but one cause,

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and as such be heard together." (5.) "And that your orators may have such other and further relief in the premises as the nature of the case may require," &c.

Gilman, Sons & Co., who were the holders of 58 bonds, and who had answered the original bill, filed their answer to the cross-bill, claiming priority of lien, both under the mortgage and under the statute, against the original complainant, the complainants in the cross-bill, and all other creditors or claimants; and they demanded proof of all adversary claims.

On final hearing, on pleadings and proofs, the special chancellor dismissed the original bill, holding that the complainant showed no right to relief, either against DuPuy or against the bondholders; but he retained the cross-bill of Morton, Bliss *et al.*, and rendered a decree under it, declaring that the bondholders, though none of them were *bona fide* purchasers for value as against the State, were entitled to have the mortgage foreclosed by a sale of the property, and to share equally in the proceeds of the sale. On appeal to this court, by Gilman, Sons & Co., this decree was reversed, and the cause remanded; the court holding that they were entitled to precedence and priority over the other bondholders, and were entitled to be subrogated to the State's statutory lien, while the others were only entitled to the security of the mortgage. See the case reported in 72 Ala. 566-87, where the facts are stated as to the purchase of their bonds by said Gilman, Sons & Co.

Robertson, the complainant in the original bill, having died, the suit was revived in the name of A. V. Gardner, as his administrator. A decree *pro confesso* was taken against the Union Trust Company, who made no defense. Afterwards, by action on the part of a majority of the bondholders, said company was removed as trustee, and John Tucker was appointed trustee in its stead. Tucker took possession and control, as trustee, of the railroad and its property, and leased it, for a term of years, to the Selma and Greensboro Railroad Company, whose name was afterwards changed to the Cincinnati, Selma and Mobile Railroad Company. After the remandment of the cause on the reversal, the complainants in the cross-bill asked leave to amend their bill, by averring these facts, and making said Tucker and said railroad lessee parties defendant; and another proposed amendment, in addition to these new parties, made J. & W. Seligman & Co., of New York, defendants to the cross-bill, as the holders or claimants of some of the railroad bonds. The special chancellor denied and refused each of these amendments as proposed; but he allowed a third amendment, which varied the allegations of the bill as to the number of bonds held or claimed by different parties, and struck out the names of several persons who had disclaimed all interest in the suit.



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The cause being again submitted for decree on pleadings and proof, the special chancellor held—1st, that the original bill was well filed, and the complainant therein was entitled to prove his claims, and to share in the proceeds of sale of the mortgaged property, after the claims of the bondholders were satisfied; 2d, that the bondholders were entitled to a foreclosure of the mortgage, which was accordingly decreed; 3d, that Gilman, Sons & Co., under the decision of this court, were entitled to be subrogated to the statutory lien of the State, and to have their bonds (58 in number) first paid out of the proceeds of sale of the mortgaged property; 4th, that Morton, Bliss *et al.*, as the holders of 150 bonds, were not entitled to be subrogated to the statutory lien of the State, but were entitled to share in the proceeds of sale of the property, equally with other bondholders in like condition, after the claims of Gilman, Sons & Co., and also of other bondholders in like condition with them, who might prove their claims before the register, had been satisfied; and he ordered a reference to the register, directing him to advertise for creditors to come in and prove their claims, to state an account of the several debts and claims, and to report the evidence adduced by each claimant.

On the reference before the register, other bondholders appeared and proved their claims, among whom were J. & W. Seligman & Co., as the holders of 47 bonds; A. W. Jones, E. K. Carlisle, A. Fowlkes, and J. W. Crenshaw, as the holders of 50 bonds; W. S. Nichols, as the holder of ten (10) bonds; and Perkins, Livingston & Post, as the holders of two (2) bonds, thus leaving out only three bonds of the entire 320 issued. Numerous exceptions were reserved by the several parties, especially by Seligman & Co. and Morton, Bliss *et al.*, to the register's rulings on evidence, and to his allowance of different claims; but none of these matters require any special notice. On the coming in of the register's report, some of the exceptions were sustained, and others overruled; and the special chancellor rendered a final decree, declaring that the creditors above named, each and all, were *bona fide* owners and holders of their respective bonds, and were entitled, equally with Gilman, Sons & Co., to be subrogated to the statutory lien of the State, and to be first paid out of the proceeds of sale of the mortgaged property; and he ordered the register to proceed with the execution of the decree of sale.

From this decree Morton, Bliss *et al.* appeal, and here make twenty-one assignments of error, and among them (1) the refusal to allow the proposed amendments; (2) the ruling that John Tucker was not a proper and necessary party; (3) holding the decision of this court conclusive as to the *status* of

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Gilman, Sons & Co., and of these appellants; (4) decreeing that these appellants were only entitled to a secondary lien, after the claims of Gilman, Sons & Co. and others are satisfied; (5) retaining the original bill, which assailed the validity of the deed of trust, and at the same time granting relief under the deed of trust, as valid. Errors were also assigned by Seligman & Co., W. S. Nichols. and Perkins, Livingston & Post, assailing the correctness of the decree as to the claims of Gilman, Sons & Co., the rejection of the proposed amendments, and other matters; and by Robertson's administrator, complainant in the original suit, founded on that part of the decree which gave the bondholders a lien prior and superior to that of his judgments. Gilman, Sons & Co., by consent, make a cross assignment of errors, as to that part of the decree which gave the several creditors above named an equal *status* with them in the right to be subrogated to the statutory lien of the State.

BROOKS & ROY, for Morton, Bliss *et al.*—1. The original bill ought to have been dismissed, because all the relief granted was "not only in the absence of appropriate allegations, but in actual contravention of the case made by the bill."—*Rives, Battle & Co. v. Walthall*, 38 Ala. 333; *Alexander v. Taylor*, 56 Ala. 60; *Meadors v. Askew*, 56 Ala. 584; *Gilman, Sons & Co. v. Railroad Co.*, 72 Ala. 566; *Flewellen v. Crane*, 58 Ala. 628.

2. The allowance of an amendment, in a proper case, is matter of right, and not matter of discretion. The chancellor's discretion extends only to the imposition of terms; and the only limitation upon the right is, that the amendment must not make an entirely new case—must not be a radical departure from the original bill, or make an entire change of parties. Code, § 3790; *Pitts v. Powledge*, 56 Ala. 150; *Harwell v. Lehman, Durr & Co.*, 72 Ala. 346; *Jones v. Reese*, 65 Ala. 135. The proposed amendments did not make a new case, but only sought to introduce proper and necessary parties, under allegations showing the respective interests of each. The Seligmans, as the holders of 47 bonds, were proper parties, in order that they might litigate with the Gilmans the priority claimed by the latter; and they might be brought in under a cross-bill, such as this.—*Coster v. Bank of Georgia*, 24 Ala. 37, 65. John Tucker was a proper party, because he had been appointed trustee, under the provisions of the deed, had accepted the trust, and was in possession of the trust estate, by and with the assent of the bondholders; and as the holder of the legal title, he was a necessary party.—*Lawson v. Ala. Warehouse Co.*, 73 Ala. 294; *Prout v. Hogue*, 57 Ala. 31; *Bibb v. Hawley*, 59 Ala. 405; *McArther v. Scott*, 113 U. S. 396; *Goodman v. Niblack*, 102 U. S. 562; *Webb v. Shaftsbury*,

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7 Vesey, 480; Story's Eq. Pl., § 156; *Sedgwick v. Cleveland*, 7 Paige, 291. The Gilmans only objected to Tucker's admission as a party, and they were estopped by their acts, having ratified his appointment, and countersigned the contract under which he assumed possession.—*McCravey v. Remson*, 19 Ala. 438. The Cincinnati, Selma and Mobile Railroad Company, under the allegations of the proposed amendments, was also a proper party, being in possession of a part of the mortgaged property, under a lease by the trustee, confirmed by a majority of the bondholders, including the Gilmans, the term of which would probably extend beyond the foreclosure sale.

3. The doctrine of subrogation is not applicable to this case. Subrogation is a mere creature of equity, not springing out of any contract, or agreement, which directly secures to the creditor the right to have his debt satisfied out of the property of the principal; but resting only on the necessity of the case, to prevent a failure of justice, when no other remedy exists; and never applying where the securities or liens sought to be reached attach to the debt itself in the first instance, nor where the surety has no right to discharge or surrender the securities. Here, the mortgage is given for the equal security and benefit of all the bondholders; the statutory lien secured to the State is equally intended to provide for the payment of the indorsed bonds in the first instance, whereby the State would be saved harmless; the holders of the indorsed bonds, having purchased the bonds on the faith of the indorsement, became parties to the contract, and are entitled to enforce it; the State has never paid or acquired any of the indorsed bonds, and it can not be sued on its indorsement; nor can any of the bondholders, through the State, acquire any priority or superior right over others, in violation of the rule, that equality is equity.—*Life Insurance Co. v. Reeder*, 18 Ohio, 35; *Jones v. Bank*, 29 Conn. 25; *Jones on Mortgages*, vol. 1, § 387; *McMullen v. Neal's Adm'r*, 60 Ala. 555; *Thrall v. Spence*, 10 Conn. 139; *Chamberlain v. Railroad Co.*, 92 U. S. 306.

4. The original bill was not framed as a general creditors' bill, but the cross-bill of these appellants, under which only relief was granted, was in that form. Under such a bill, if there is sufficient evidence, a reference to the master or register is ordered, but nothing is decided as to the merits of any claim. The parties go before the register, each on his own merits, with equal right to prove his own claim, and to contest every other claim.—Story's Equity, §§ 548, 549; Story's Eq. Pl., §§ 101, 158; *Galveston Railroad Co. v. Cowdry*, 11 Wall. 477; *Whitaker v. Wright*, 2 Hare, 310. Here, on the former appeal, Morton, Bliss *et al.* did not complain, and did not assign errors, because the decree gave no preferences, but placed all



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creditors then before the court on an equality. This decree was reversed on appeal, at the instance of Gilman, Sons & Co., who alone complained of it. After the reversal and remandment, other creditors were not allowed to be brought in as parties, but were given permission to come in before the register, prove their claims, and contest the claims of all other creditors and claimants, "except the priorities hereinbefore ascertained and established"—that is, the preference awarded to Gilman, Sons & Co. Other creditors did come in and prove their claims, and some of them were held entitled to equal rights with Gilman, Sons & Co.; but, while their claims were contested by Gilman, Sons & Co., they were not allowed to contest or question the standing of these preferred creditors. This is an unusual practice under a creditors' bill, and amounted in effect, as to these new creditors, to a deprivation of their property rights without a hearing in court. Of course, no evidence could be adduced before the register, contesting or impeaching the claims of Gilman, Sons & Co., since the register was bound by the chancellor's adjudication as to their standing; but this does not authorize the inference that no such evidence could have been offered.—*Rice v. Drennen*, 75 Ala. 337.

5. Gilman, Sons & Co. are not entitled to any preference over other bondholders, under either their pleadings or the evidence. In their answer, they claim under the mortgage, or deed of trust, as the holders of bonds thereby secured; and their additional claim of a statutory lien, if well pleaded for any purpose, can not be allowed to antagonize the terms of the deed.—*Reaves v. Garrett*, 34 Ala. 558; *Morris v. Hall*, 41 Ala. 527; *Hatchett v. Blanton*, 72 Ala. 423; *Hart v. Johnson*, 6 Ohio, 87. But the pleadings nowhere claim or show a right to priority over other bondholders, arising out of the misapplication of the bonds by DuPuy, and notice of that misapplication to other bondholders; and allegations of mere legal conclusions, unsupported by facts, are clearly insufficient. *Willingham v. Harrell*, 36 Ala. 580; *Duckworth v. Duckworth*, 35 Ala. 70; *Flewellen v. Crane*, 58 Ala. 628. Nor is their claim of priority established by the evidence. The *onus* was on them to show that they purchased the bonds for valuable consideration, before maturity, without notice of any defect or infirmity of title; and notice of facts sufficient to excite suspicion, and put them on inquiry, was sufficient to charge them with notice of every fact that would have been discovered on inquiry.—*Ross v. Drinkard*, 35 Ala. 437; *Reid v. Bank of Mobile*, 70 Ala. 199; *Mayor of Wetumpka v. Wharf Company*, 63 Ala. 632. Three of the partners deny notice, but the fourth partner is not examined as a witness; and John Tucker testifies positively, with great circumstantiality of detail, that

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he gave them full notice, pending their negotiations with Crawford. His language, speaking of his first interview with their senior partner, is: "I can not give the exact date of the interview, but it was before the negotiations between the parties were concluded, and the exchange of bonds and stocks made. . . I had said interview to impart to them such information as I had about the said railroad corporation. The *status* of said railroad corporation, the *status* of said bonds, and the circumstances surrounding the enterprise, were all mentioned and discussed at said interview. They inquired of these matters. I was possessed of information about all these matters, and I did not withhold from them any information I possessed. I was familiar with all the facts and circumstances with respect to said railroad, said bonds, and the circumstances under which they had been issued; and I imparted all the information I had to the said senior partner of said firm." This was before the 22d July, 1871, when the bonds were delivered and the contract consummated, and was sufficient notice.—*Sewing-Machine Co. v. Zeigler*, 58 Ala. 221. Notice was thus brought home to Gilman, Sons & Co., of facts at least sufficient to put them on inquiry.—*Foster v. Stallworth*, 62 Ala. 529; *Wilson v. Wall*, 34 Ala. 303. Besides, this issue of fact was decided against them by the special chancellor; and this court will not disturb his decision, unless there is a decided preponderance of the evidence against its correctness.—*Marlowe v. Benagh*, 52 Ala. 114; *Phillips v. Phillips*, 39 Ala. 63; *Kirksey v. Kirksey*, 41 Ala. 641; *Derrick v. Brown*, 66 Ala. 166.

6. But, if the former decision as to the *status* of the Gilmans be adhered to, the same rules, applied to other creditors, will put them on an equal footing with the Gilmans. Morton & Bliss, although they acquired their bonds from DuPuy, had no notice of his misapplication of them. They knew that he had a large contract for constructing the road, and the bonds showed on their face that the company had complied with all the provisions of the statute necessary to entitle it to the State's indorsement. They did not know that work on the road had been suspended, and might well suppose it was still progressing. *Plock v. Cobb*, 64 Ala. 161. It was not material to them, nor to the State, whether their debt was paid with the first bonds, or with bonds issued for any subsequent section of twenty miles. If he had sold these bonds on the market, and paid their debt with the proceeds, no one could have complained; nor could the title of the purchaser be impeached. The bonds were in regular form, and were commercial paper; DuPuy was in possession of them, and had the right to dispose of them; and it is not to be presumed, as said on the former appeal, that he would disclose any defect in his title to a purchaser or cred-

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itor proposing to take them. Appellants' title is certainly unassailable, if that of the Gilmans is sustained.—*Murray v. Lardner*, 2 Wall. 119; *Goodman v. Harvey*, 4 Ad. & El. 780.

7. The Seligmans are purchasers for value without notice, equally with the Gilmans, or any other creditors, unless the past-due coupons attached to their bonds made them dishonored on their face. The authorities are conclusive on this proposition.—*Cromwell v. Sac County*, 96 U. S. 58; *Jackson v. Ludeling*, 21 Wall. 618; *Parsons v. Jackson*, 99 U. S. 434; *Railway v. Sprague*, 103 U. S. 756; *Thompson v. Perrine*, 106 U. S. 589; Dan. Neg. Instr., §§ 787, 1506; Jones R. R. Securities, § 199; *Plock v. Cobb*, 64 Ala. 131; *Kelley v. Whitney*, 45 Wis. 110.

8. None of these appellants purchased after the repeal of the act under which these bonds were indorsed, and therefore the repeal of that statute can not affect their rights. Nor can the repeal impair the rights of Nichols, and of Perkins, Livingston & Post, who purchased subsequently. The repeal did not destroy the negotiability of the bonds, nor show a repudiation of its liability by the State.—*Morgan v. United States*, 113 U. S. 476; *Texas v. White*, 7 Wall. 700; *Colt v. Barnes*, 64 Ala. 108.

9. On the general equities of the case, the prominent fact is, that all the means with which the road was built were furnished by Morton & Bliss and Crawford, who now ask and offer equality to all bondholders; while Gilman, Sons & Co., who furnished nothing, and paid for their bonds with worthless stocks, seek an unconscionable advantage, and claim a preference.

E. W. PETTUS, D. S. TROY, and WILLIAMSON & HOLTZCLAW, for Gilman, Sons & Co.—1. Each of the rejected amendments proposed to make John Tucker a party defendant, who was appointed trustee pending this suit, and without the sanction or approval of the court. The court might have made him a party, but was not bound to do so; and properly refused to make him a defendant, on objection by Gilman, Sons & Co. The statute regulating amendments was not intended to require, as matter of right, the introduction of new parties who might acquire any interest by purchase or assignment *pendente lite*, and thereby enable defendants, while in possession of the property, to prolong the litigation indefinitely.—*Love v. Graham*, 25 Ala. 187; *Lee v. Lee*, 55 Ala. 590; *Webb v. Shaftsbury*, 7 Vesey, 480; Hill on Trustees, 269.

2. By the established practice with us, as in other States, the chancellor settles the equities among the parties before the court, and allows others to come in before the register; and the



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cause is not ready for hearing, until this can be done. In a suit for the foreclosure of a mortgage, where there are different classes of creditors, those before the court necessarily represent others of the same class. A rule would be impracticable, which required all the creditors, however numerous, to be brought in, before the general equities of any could be settled.—*Garner v. Pruitt*, 32 Ala. 13; *Campbell v. Railroad Co.*, 1 Woods, C. C. 368; 1 Dan. Ch. Pr. 191, 245, note 6; *Ib.* 635; *Neve v. Weston*, 3 Atk. 557; Story's Eq. Pl. § 193, note; *Barber v. Walters*, 8 Beav. 92.

3. As to the *status* of the bonds held by Gilman, Sons & Co., and their right to be subrogated to the statutory lien of the State, the case is presented as on the former appeal, and the former decision is an unanswerable argument in their favor.

4. None of the other bondholders show themselves entitled to share in this preference. Morton & Bliss, taking their bonds from DuPuy, in payment of his debt contracted for materials used in building the first twenty miles of the road, participated in their misapplication, and can claim nothing as against the State.—72 Ala. 566. By the terms of the mortgage, the principal sum became due on default in the payment of interest for ninety days after demand made; and the fact of such demand and default is admitted in the pleadings, and is not denied by any one. All subsequent purchasers are chargeable with notice that the bonds were dishonored. Some of the bonds, when purchased, had past-due coupons attached, for several years interest; and some were purchased after the repeal of the statute under which they were indorsed. None of these bondholders can claim to be purchasers for value, before maturity, and without notice.—*Smith v. Sac County*, 13 Wall. 139; *Boyd v. McIver*, 11 Ala. 822; *Thompson v. Armstrong*, 7 Ala. 256; 1 Dan. Neg. Instr., 580, 644; *Morgan v. United States*, 113 U S. 476; *Andrews v. Pond*, 13 Peters, 65; *Goodman v. Simons*, 20 How. 365. Seligman, Perkins, Nichols and Levy were examined as witnesses after they had filed their bonds; each of them stated when and how he acquired his bonds; each knew when he acquired notice of the default; and his failure to deny that he knew the fact at the time of his purchase, is an implied admission that he then knew it.—1 Greenl. Ev., § 38; 7 Ala. 256; 11 Ala. 822; 42 Me. 202.

SOMERVILLE, J.—There can be no doubt of the general rule, that the question of amendment, in every proper case, in a court of equity, is not limited by the discretion of the chancellor, but is a matter of legal right, so long as the proposed amendment does not work an entire change of the parties, or introduce a radical departure from the case made by the origi-

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nal bill. But this rule can not be said to be so universal as to be absolutely without exception.

The statute provides, among other things, that "amendments to bills must be allowed, at any time before final decree, by striking out or adding new parties, or to meet any state of evidence which will authorize relief;" and if such amendment be allowed at the hearing, "the party against whom the amendment is allowed shall be entitled to a continuance, as a matter of right; and if the cause is continued, both parties shall have the right to take additional testimony."—Code, 1876, § 3790.

This section of the Code can not, in our opinion, be construed to authorize as matter of right, in every case, the introduction of parties who have acquired by purchase, or voluntary assignment *pendente lite*, an interest in the subject-matter of litigation. It must be construed in the light of the established rules of chancery practice, which are in harmony with the known purpose of its enactment. One of these prevailing and necessary rules is, that courts of equity are never compelled to take notice of such assignments of interest as result from the voluntary act of parties, as distinguished from mere assignments by operation of law,—as in cases of death, bankruptcy, and the like. The two classes of cases are clearly distinguishable on the soundest principle, both in the light of reason and authority. Whoever purchases property *pendente lite*, takes it subject to the hazards of the pending litigation. The decree against the parties litigant is equally binding on all such purchasers. The unanswerable reason of the rule is, that otherwise chancery suits would be absolutely interminable, at the mere option of the litigants, who would be able, by collusion or otherwise, to protract litigation forever, by the single device of repeated and successive transfers from one to another.—*Cook v. Mancius*, 5 Johns. Ch. 89; Story's Eq. Pl. § 156; Barbour on Parties, p. 361; *Bishop of Winchester v. Paine*, 11 Ves. 194; *Peevey v. Cabaniss*, 70 Ala. 253. In *Sedgwick v. Cleveland*, 7 Paige, 287, where this principle was announced, it was observed by WALWORTH, Ch., that "the assignee who is a mere voluntary purchaser, *pendente lite*, can not defeat the complainant's rights, or delay his proceedings by such purchase; for, if he could do so," he added, "the litigation by successive assignments might be rendered interminable."

It can not be supposed that the General Assembly, in the enactment of our statute of amendments, designed the repeal of so salutary a rule, the effect of which would be to destroy the most vital function of the judicial tribunals of the country, which is to administer right and justice, obediently to the mandate of the constitution, "without sale, denial or *delay*."

The rule in question necessarily embraces the case of trus-

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tees of express trusts, who, being the repositories of the legal title, are brought before a court of equity for the full and complete administration of the trust. The reason of the law applies to them, with even greater force than to ordinary assignees; because, otherwise, they might, by collusion, indefinitely procrastinate the settlement of their trusts with the court; and the temptation to do this, in cases of financial embarrassment, is known often to be very great. Hence the prevailing rule, that, when once a court of equity rightfully assumes jurisdiction of the cause in which an express trust is involved, it will not suffer any new appointment of trustees to be made, unless it be done under the immediate sanction and control of the court itself.—Hill on Trustees (2d Ed.), 269; *Webb v. Earl of Shaftsbury*, 7 Ves. 480. The inherent jurisdiction of courts of equity, over the whole subjects of trusts, involves the power of removing trustees for sufficient reasons shown, in all proper cases, and also the correlative power of substituting suitable successors.—Willard's Eq. Jur. 470-471. It becomes necessary, therefore, to obtain the sanction of the court, where a corporation, or other donee of the power of appointment, who has been brought under the jurisdiction of its authority, desires to exercise it.—2 Perry on Trusts, 280-282. The giving or withholding of such sanction must depend upon the facts of each case, and is, necessarily, a discretionary power, to be exercised in such manner as to promote the ends of justice, and not unreasonably for its denial or delay.

We hold, therefore, that a purchaser, or voluntary assignee, *pendente lite*, from a defendant in the cause, is not a necessary party, and only becomes a proper party defendant by the sanction of the Chancery Court, when it is proposed to introduce him by amendment of the pleadings, and objection is interposed by the complainant, or other party whose rights may be prejudiced by delay of the proceedings.

Applying this principle, we see no error in the refusal of the court to allow the amendments proposed to the cross-bill of Morton, Bliss, and others. These amendments were each proposed and rejected as a whole, and each embraced the introduction of John Tucker, and the Cincinnati, Selma, and Mobile Railway Company, as parties defendant. Both of these suggested parties had become interested in the subject-matter of the suit after the filing of the bill, and must be bound by the decree in the cause just as if they had originally been made parties. Tucker was appointed trustee by the directors of the defendant corporation, upon the removal by them of the Union Trust Company, without the approval of the court; and the Cincinnati, Selma and Mobile Railway Company also acquired its lease *pendente lite*. The proposed amendments were vitiated



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by including in them these parties, irrespective of other objections urged, which we need not consider.

3. The original bill showed a clear case for equitable relief, and no error can be predicated on the refusal of the court to dismiss it. The complainant, Robertson, was a judgment creditor of the defendant corporation, with a return of "no property found" after the issue of sundry executions on his judgments. This conferred on him a lien on the equitable assets of the insolvent corporation, and entitled him to the assistance of a court of equity in the removal of any improper incumbrance upon its property, which might constitute an impediment to the enforcement of his legal rights. The facts stated in the bill show that the bonds issued by this corporation, and indorsed by the State, which had been delivered to the contractor, DuPuy, had been fraudulently misapplied to uses prohibited by the law which authorized their issue. They are alleged to have been used in constructing the first twenty miles of the road, whereas this was expressly prohibited by the law of their creation. The fact of such mis-use, being alleged to be within the knowledge of the defendants, who are holders of these bonds, would deprive them, if true, of the statutory lien given to the State by the act of February 21st, 1870, to which they would otherwise be entitled as *bona fide* holders upon the principle of subrogation.—Acts 1869–70, p. 149; *Gilman & Sons v. New Orleans and Selma R. R. Co.*, 72 Ala. 566. The powers of a court of law would be totally inadequate to remove this alleged incumbrance from the title of the property sought to be sold, or to ascertain and adjust the conflicting rights of the various bondholders, dependent upon the circumstances under which they acquired these bonds. The only proper forum for a settlement of these questions was a court of equity.—*Dargan v. Waring*, 11 Ala. 988; Bump on Fraud. Conv. 518.

4. The demurrer to the cross-bill of Morton & Bliss was, in our opinion, properly overruled. The theory of the original bill was, that the bonds held by these and the other defendants were not valid liens upon the property of the railroad company, as against the complainant in such bill. The purpose of the complainants in the cross-bill was to establish and enforce a lien, claimed in direct antagonism to the averments of the original bill. The various bondholders, moreover, held opposite interests, and being co-defendants, a cross-bill was both appropriate and necessary in order to adjust their conflicting priorities claimed over the subject-matter involved in litigation. *Cullom v. Erwin*, 4 Ala. 452, 461; *Davis v. Cook*, 65 Ala. 617; 2 Dan. Ch. Prac. 1550.

5–6. We do not propose to review the principles of law settled when this case was last before us on appeal, being fully

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persuaded as to their correctness. We are, moreover, satisfied with the conclusion reached in that decision, and here adopted by the chancellor, as to the *status* of Gilman, Sons & Co., in reference to the fifty-eight bonds described in the pleadings as held by them. The evidence now before us does not materially differ from what it was then. After a proper consideration of the facts, we decided that they were *bona fide* holders of these bonds, without notice of the illegal misapplication made of them by DuPuy as the immediate transferree of the railroad company. Upon petition for re-hearing, we declined to modify that conclusion; and after a further consideration of the case, we still adhere to it.—*Gilman, Sons & Co. v. New Orleans and Selma R. R. Co.*, 72 Ala. 566.

Nor do we discover any error in the conclusion attained by the chancellor as to the *status* of Morton & Bliss, in reference to the bonds held by them. It is no where denied that they received these bonds for a large debt due them by DuPuy, for iron furnished to equip the first twenty miles of the road. They sold the iron to DuPuy for this express purpose, and none other, and the fact is so declared in a written contract between the parties, bearing date June 8th, 1870. They are, therefore, conclusively charged with a knowledge of the fact. The appropriation of the bonds to this purpose, so far as the State of Alabama was concerned, was in direct violation of the statute, because, as observed by BRICKELL, C. J., when the cause was last before us for decision, it was “a diversion of the bonds from the uses and purposes to which they were by the statute appropriated, and to which the company, by the very act of procuring and accepting the indorsement, agreed they should be solely and exclusively appropriated.”—*Gilman, Sons & Co. v. New Orleans and Selma R. R. Co.*, 72 Ala. 580, *supra*.

The court is of opinion that Morton & Bliss must be charged with notice of DuPuy's illegal use of these bonds, and that, for this reason, they can not be considered as *bona fide* purchasers of them for value without notice. The law under which they were issued required the railroad company to construct the first twenty miles of the road exclusively out of its own resources, and independent of State aid, as an indispensable condition to the indorsement of its bonds by the State; and any expense incurred in building such portion of the road is also prohibited from being *refunded*, in whole or in part, from the proceeds of the bonds indorsed by the State.—Acts 1869–70, p. 152; *Gilman, Sons & Co. v. N. O. & S. R. R. Co.*, *supra*. This is a sweeping prohibition, of plain meaning and purpose.

The bonds themselves make special reference to this statute, under which they were indorsed and issued; and it is not de-

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nied that all purchasers of them are charged with notice of its provisions, this being a well-established principle of law regulating the purchase of such securities in the stock markets of the commercial world.—*Morgan v. United States*, 113 U. S. 476; *Jones on R. R. Securities*, §§ 226, 297.

The claimants knew that their demand against DuPuy was incurred for materials sold by them to aid in building the first twenty miles of the road. They knew that the laws of Alabama forbid the bonds of the road being used for this purpose; and they must have known, therefore, that *prima facie* they were participating in the violation of the law, when they accepted these securities, thus indorsed by the State, in payment of their debt against DuPuy. It was their duty to make inquiry as to the true state of facts, and, had they done so, such inquiry would have disclosed the information that the work on the road had been abandoned after the construction of the first twenty miles. It was entirely immaterial that the Governor of Alabama had required the proof to be made, as provided for by statute, that the portion of the road already constructed had been built from other resources of the company, independent of the aid derived from the State, or that he had indorsed the bonds in the name of the State on the faith of this evidence. The use made of the bonds was prohibited by the statute, without any mention of the time when it might be done. A misappropriation *after* such proof was made to the Governor was just as unlawful as it would have been *before* such executive action. Morton & Bliss can not claim to have been misled by this act of the Governor, in view of the knowledge imputed to them by the facts of this case. They acquired only the right of DuPuy, and received the bonds subject to all the equities attaching to them in his hands.

7. As against the railroad company, however, these bonds were, in our judgment, valid in the hands of Morton & Bliss. They were delivered to DuPuy, it is true, partly in consideration of a promise made by him that they should be used in the further extension of the road, as well as in part payment of a debt due for that portion of the road which he had already constructed. Possibly, the diversion in the use of the bonds subsequently made by him may have constituted a failure of consideration, which could have been urged in defense by the road, unless it was in some manner waived. This we concede only for the sake of argument, without intending to intimate any opinion on the point. The railroad company, although a party to the suit, makes no complaint of this nature. On the contrary, by abandoning any effort to extend the road further by reason of their intervening insolvency, and by continued recognition of their liability to DuPuy, they seem to have ac-



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quiesced in the uses to which the bonds were put by him, and have thus waived this defense. The consideration of the bonds can not be impeached, in this particular, by a stranger not standing precisely in the situation of the original parties, and identified in equity by privity of title with them.

The chancellor properly decreed that the lien of the mortgage, or deed of trust, executed by the railroad company \*to the Union Trust Company, of New York, enured to the benefit of Morton & Bliss equally with the other holders of all the 320 bonds issued by the company and indorsed by the State. But such lien is subordinate to that created by the statute in favor of the State, to which all parties are entitled to be subrogated who are shown to be *bona fide* purchasers for value before maturity, and without notice of existing defenses against the original holder. This mortgage was duly recorded, and this charged the complainant, Robertson, with notice of its existence. The lien of the complainant's judgments described in the original bill were properly, therefore, decreed by the chancellor to be subject to these superior incumbrances.—*Kelly v. Trustees*, 58 Ala. 489; *Colt v. Barnes*, 64 Ala. 108.

8. It is contended in behalf of Seligman and others, that the chancellor erred in so far settling the equities of the case as to adjudge *in limine* the fact of Gilman, Sons & Co.'s *status* as *bona fide* holders of the bonds claimed by them. It is insisted that this question should have been left open for contestation by all creditors who might subsequently appear before the register, and prove their claims under the decree. To deny this right, it is said, is to deprive such parties of their legal rights without giving them a day in court, and, therefore, without due process of law. The argument invoked ignores an established rule of chancery practice, which has never been interpreted to be violative of any principle of *Magna Charta*, or of our Bill of Rights. This rule is, that, when the parties to a cause are numerous, or some of them are unknown, or beyond the jurisdiction of the court, so as not to be subject to its process, but they all belong to a class whose rights are analogous to those of parties actually before the court, because dependent on the same principles of law, the court will often proceed to adjudge the rights of the class as such, and, in the absence of all collusion, the decree will be considered binding upon the whole class who are in like situation.—Story's Eq. Plead. §§ 99–115; 1 Dan. Ch. Pr. 1911. This principle is fully recognized by Rule No. 20 of our Chancery Practice, which makes it discretionary with the chancellor, in such cases, to dispense with bringing before him all the interested parties, and provides that the court may proceed in the cause without making such persons parties, provided it has sufficient parties

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before it to represent all the adverse interests of the plaintiff and the defendant in the suit." Nor is it repugnant to the concluding provision found in the same rule, declaring that "the decree shall be without prejudice to the rights and claims of the absent parties."—Code, 1876, p. 164, Rule No. 20. This, as we shall proceed to show, is the right to come in under the decree, and not in antagonism to what is properly settled by it. This is especially true of a creditor's bill, which is usually filed, not only in behalf of parties complainant actually before the court, but also in behalf of all persons of the same class, who afterwards elect to come in under the decree, and make proof of their claims before the register or master. Issues thus fairly tried, and equities thus adjudged, between the parties served with process, are held binding upon those absent, because of this vicarious representation in the person of litigants of the same class to which they belong. "The other creditors," as Mr. STORY observes, "may come in *under the decree*, and prove their debts before the master to whom the cause is referred, and obtain satisfaction of their demand equally with the plaintiffs in the suit; and under such circumstances they are treated as parties to the suit."—Story's Eq. Pl. § 99. And while it is true, generally, that each creditor, who may afterwards appear and prove his claim, may contest the claim of every other creditor, this right is subject to the exception, that it must be exercised in conformity to the principles settled by the decree under which the reference was had, and nothing settled by this decree is allowed to be re-examined by the register, who, under our practice, discharges the functions of a master.—2 Dan. Ch. Pr. 1210.

While these principles of chancery practice are admitted by counsel, their logical consequences are nevertheless denied. It can scarcely be contended that the register committed any error in refusing to permit Seligman and others to re-try before him the issues settled by the decree of reference. But, as we understand the argument, the objection is, that the chancellor rendered a decree in which he undertook to settle any equity before all the creditors had been brought before the court by proof of their claims. There is no complaint of any refusal on the chancellor's part to correct any alleged error in his decree, upon the evidence before him at the time of its rendition. The objection urged, it will be seen at a glance, assails the right of the chancellor to render any final decree, settling the equities of a class, until after a reference has been made to the register, and all persons interested, however numerous, have appeared in court by making proof of their claims. A sufficient answer to this position is, that the contrary practice is settled in this State, on a basis too solid and ancient to be disturbed at

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this late day. The common practice has always been, to permit the chancellor to render a decree settling all the equities in the case, which are disclosed by the bill, prior to making a reference. "These equities embrace the substantial merits of the controversy—the material issues of fact and law litigated, or necessarily involved in the cause, which determine the legal rights of the parties, and the principles by which such rights are to be worked out."—*Adams v. Sayre*, 76 Ala. 509, 517; *Cochran v. Miller*, 74 Ala. 50; *Malone v. Marriott*, 64 Ala. 486; *Walker v. Crawford*, 70 Ala. 567; *Jones v. Wilson*, 54 Ala. 50; *Garner v. Pruitt*, 32 Ala. 18.

One of the equities involved in the present case, and raised by the pleadings, was, whether Gilman, Sons & Co. were *bona fide* holders of the bonds claimed by them, and purchasers of the paper for value before maturity, and without notice. This issue was fairly litigated between the complainant as a judgment creditor, and with Morton & Bliss and others as representing the other bondholders secured by the deed of trust, whose interest it was to defeat the priority thus claimed by and adjudged in favor of Gilman, Sons & Co. If one of the other bondholders, who afterwards might appear before the register and make proof of his claim under the decree, could introduce new evidence, and thus re-open the case on the reference, why may not every other bondholder and judgment creditor do the same? And, if each can do so successively, as they are permitted to come in, when is the litigation to cease in the given cause? It is not to be lost sight of that, in the case of stock companies, and large corporations whose capital stock is now often valued at millions of dollars, the number of litigants will not improbably be numbered by thousands. If the Chancery Court in such cases be prevented from rendering a decree which would preclude the right of perpetual litigation, the utility of the rule allowing a single creditor to represent the class to which he belongs, would be defeated, and especially would its main purpose of saving expense and delay be practically frustrated. It has often been objected before, that this rule operates unjustly against all parties not before the court when the decree was rendered; but to this objection it may be answered, that "it is better to go as far as possible towards justice, than to deny it altogether."—*Cockburn v. Thompson*, 16 Ves. 328, 329.

9. One question raised in this case is, whether the failure to pay interest on coupon bonds before the principal of such bonds is due, standing alone, so dishonors the paper as to subject it to antecedent equities in the hands of an otherwise innocent purchaser for value. It is insisted that there is no difference, in reason, between a failure to pay interest, and a failure to pay principal, and that, when one purchases bonds, the principal of



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which is not due, but with coupons attached that are past-due, the paper is dishonored on its face, and the purchaser acquires only the title of his immediate vendor, affected by all existing equities.

It is certainly true that the only holder to whom the law merchant accords full protection is the *bona fide* purchaser for value, without notice, and before maturity. Purchasers of bonds, and other commercial paper past-due, take only the right and title of their immediate vendors.—*Texas v. White*, 7 Wall. 700; *Fenouille v. Hamilton*, 35 Ala. 319.

There seems to be no difference of opinion on the proposition, that where the principal of the bond or bill is payable in installments, the paper becomes dishonored by a failure to pay any one installment, which is overdue.—1 Danl. Neg. Instr. § 787; *Vinton v. King*, 1 Allen, 562.

But, according to the weight of authority, in our opinion, this rule is not strictly applicable to a failure to pay interest. Some courts, it is true, have repudiated this distinction, and have held, with much reason, that the payment of interest stands on precisely the same footing as the payment of the principal, and that the failure to pay either dishonors the paper.—*Nevell v. Gregg*, 51 Barb. 263; *First Nat. Bank of St. Paul v. County Comm'rs*, 14 Minn. 77. But this does not seem to be the view generally adopted, especially as applicable to coupon bonds, which may be regarded as an invention of modern commerce, and have recently become so common a subject of merchandise in the stock markets of the commercial world.

In *Boss v. Howit*, 15 Wis. 260, decided by the Supreme Court of Wisconsin in the year 1882, it was held that the maturity of a note, within the meaning of the law-merchant, is the time when the principal falls due, and that the interest being due when one comes into the possession of commercial paper by purchase, does not make him a purchaser after maturity, so as to let in defenses that might have been made as between the original parties. This view was subsequently affirmed by the same court in the case of *Kelley v. Whitney*, 40 Wis. 110; s. c., 30 Amer. Rep. 697.

In *Brooks v. Mitchell*, 9 M. & W. 14, where a promissory note, payable on demand, had been indorsed several years after date, and no interest had been paid on it for three years before such transfer, it was held not to be dishonored as overdue by reason of this fact, in the hands of a holder otherwise without notice of any existing defense or infirmity of title. In this case it was observed by Baron PARKE, that "a promissory note, payable on demand, is intended to be a continuing security."

In *National Bank v. Kirby*, 108 Mass. 497, the court declined

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to place the non-payment of interest and principal, in such cases, upon the same basis, and, after indorsing, in substance, the doctrine of the foregoing cases, observed as follows: "There is a large class of negotiable securities, the principal of which is payable only at the end of many years, but with interest payable either annually or semi-annually; and many of the notes given in the purchase of real estate and secured by mortgage, especially in the country, are of this class, as are most of the obligations for debt contracted by public, and many of those incurred by private corporations; and it is important that the value due to their negotiable character should not be impaired by new rules tending to lessen their currency and credit." It was, however, held by the court, that the fact of interest being overdue was one to be considered by the jury, in connection with other circumstances, as affecting the question of good faith in the holder, and the probability of his having had notice of existing equities at the time of his purchase.

The same doctrine has been approved by the Supreme Court of the United States, in many decisions, especially as applicable to coupon bonds. In *Cromwell v. County of Sac*, 96 U. S. 51, it was decided, that the mere fact of one installment of interest being overdue and unpaid, disconnected from other facts, was insufficient to affect the position of one who was otherwise a *bona fide* purchaser of coupon bonds for a valuable consideration. "The interest stipulated," said Mr. Justice FIELD in this case, "was a mere incident to the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond—that is, until the principal was payable." The court further said: "To hold otherwise, would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many cases hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons, dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities, and correspondingly diminish their value."

The doctrine of this case was approved in *Railway Co. v. Sprague*, 103 U. S. 756, where it was held, that the presence

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of two unpaid coupons overdue upon bonds, the principal of which was not due, would not, of itself, be sufficient evidence of the dishonor of the paper to which they were attached. The court distinguished the case from *Parsons v. Jackson*, 99 U. S. 756, where a contrary assertion of Mr. Justice BRADLEY was pronounced to be a *dictum*. In the latter case, there were other pregnant evidences of the invalidity of the bonds, besides the fact of the coupons being overdue. The place of payment was left unfilled on the face of the bonds themselves. Coupons overdue remained unpaid for a great number of years, and the bonds were purchased for the small consideration of from ten to fifteen cents on the dollar. These facts, taken together, were held to be sufficient evidence of the dishonor of the paper; and it was said that "the opinion must be restricted to the case before the court."

In *Thompson v. Perrine*, 106 U. S. 587, where the contention was that coupons, which were detached from the bonds, and overdue when purchased by the plaintiff, were dishonored, and therefore not negotiable by the law-merchant, the court refused to sustain the point, and held that, the bonds not having matured at the time of the purchase, the coupons, though overdue, had not lost the quality of negotiability.

In *Morgan v. United States*, 118 U. S. 476, 501, after a full review of the previous decisions, and a recognition of the principle, that a demand must be made in a reasonable time for paper payable on demand, as coupons usually are, the rule in question was again approved, with the assertion, that any holder of a coupon bond "had a right, without prejudice except as to the loss of interest, to wait without demand for the whole period at the expiration of which the bond was unconditionally payable."

In *Plock & Co. v. Cobb*, 64 Ala. 127, 158, the following language was used by this court: "The dishonor of the unpaid coupons for interest did not infect with dishonor the bond or other coupons, putting on inquiry those who in the usual course of trade, in good faith, and upon a valuable consideration, should acquire them."—See Jones on Railroad Securities, § 199; Danl. on Negotiable Instr., § 1506 *a*; Colebrooke on Collateral Secur., § 46.

We adopt the rule announced in *Railway Co. v. Sprague*, 103 U. S. 756, among other reasons, because of its simplicity and certainty. If a failure to punctually present coupons attached to such bonds, now so rapidly increasing as a part of the vast circulating capital of the country, is to operate to dishonor them on their face as matter of law, the question may arise as to how many coupons will be required to have this vitiating effect. Shall the courts name a dozen, or a score?



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Or, if not, in what manner is the fatal number to be ascertained, so as to establish a fixed rule by which the purchasers of such paper may be intelligently governed when they enter the market for an investment? "Certainty," said Lord HARDWICK, "is the mother of repose, and therefore the law aims at certainty."—*Walter v. Tryon*, 1 Dickens, 245. "It is better that the law should be certain," Lord ELDON observed, "than that every judge should speculate upon improvement in it." *Sheddon v. Goodrick*, 6 Ves. 497. And we may add, that it is often more important that a rule of law should be fixed, even though with less of reason in it, than that it should be vague and uncertain, but with a better show of reason.

The opposite rule, which is contended for by the learned counsel with such ability and earnestness, would not necessarily operate to protect the makers of dishonored paper, who have just defenses, because of the facility with which holders could remove overdue coupons before putting them on the market. It might rather tempt to the frequent commission of fraud, by clipping such coupons from the bonds prior to selling them.

It is obvious, moreover, that great inconvenience, if not injustice, would result, in having one rule prevailing in the Federal courts, and another in the State courts, affecting the title of commercial paper. Litigants who were non-resident would resort to the Federal courts to sue on such paper, where ample security would thus be afforded their titles. The State courts would deny this protection to resident citizens, under precisely the same state of circumstances. What was justice in one court would thereby be adjudged to be injustice in the other. Commerce, on the other hand, is broad and expansive, and is growing more so with the progress of civilization, and with every new discovery of modern art and science. Uniform rules, therefore, are desirable, which, being based on liberal and comprehensive principles of public policy, will be recognized as of force in every commercial centre, where its currents are permitted to ebb and flow freely and without restriction.

There is, however, one aspect in which, according to all the authorities, the presence of overdue coupons upon such bonds is material and important. While not conclusive of the fact of dishonor, "it is still a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder is entitled to the position of one who has taken it in good faith, and without actual or constructive notice of existing defenses."—*National Bank v. Kirby*, 108 Mass. 497. It goes, in other words, to the question of good or bad faith, because it may often tend to show that the purchaser had notice, actual or constructive, of the fact of dishonor. Taken

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in connection with other significant facts, it may become convincing, and even conclusive.—*Cromwell v. County of Sac*, 96 U. S. 58; *Railway Co. v. Sprague*, 103 U. S. 756.

10. The rule is now settled in this State, in harmony with the general weight of authority in this country and England, that mere suspicion on the part of the purchaser of negotiable paper, or knowledge of facts which would, in the mind of a prudent man, excite suspicion, of a defect in the seller's title, is not sufficient to impair or vitiate the title of such purchaser. To have this effect, there must be bad faith on his part.—*Gilman, Sons & Co. v. N. O. & Selma R. R. Co.*, 72 Ala. 566; *Murray v. Lardner*, 2 Wall. 110; *Farrell v. Lovett*, 68 Me. 326; s. c., 28 Amer. Rep. 59; *Kelley v. Whitney*, 30 Amer. Rep. 697. And while gross negligence is not itself the same as bad faith, it may be evidence of it, inasmuch as the act of negligence may be so wanton as to afford good ground for believing that it was intentional and fraudulent.—1 Parsons Notes & Bills, 259. The test is, whether the facts, of which the purchaser has notice, are inconsistent with any other view than that "there is something wrong in the title" of the seller. 1 Dan. Neg. Instr. § 796; *Parsons v. Jackson*, 99 U. S. 441. Bad faith will not be imputed, unless, as said by Mr. Parsons, "there be something in the particular transaction which is equivalent to fraud, actual or constructive."—1 Parsons on N. & B. 257. But a deliberate and intentional avoidance of knowledge, or a willful closing of the eyes to facts, will be construed to have the same effect as knowledge or actual notice. 1 Dan. Neg. Instr., §§ 796, 799; Jones on R. R. Securities, § 299.

11. It is argued, however, in this case, that the principal of the bonds, as well as the entire interest, became due in July, 1872, under the terms of the contract, by reason of the failure of both the State and the railroad company to pay the coupons then matured; and that all purchasers after this date are to be regarded as purchasers after the dishonor of the paper, and therefore not entitled to protection under the settled rules governing the transfer of commercial paper. That the bonds were due at this time, seems to admit of no controversy. The fact is alleged, and admitted on all hands in the pleadings, and is established by the evidence. If any purchaser knew this fact, or was chargeable in law with notice of it, at the time of his purchase, it is clear that the contention must be sustained.

We have said that every holder of these indorsed bonds must be presumed to have knowledge of the laws of Alabama by authority of which they were created and put in circulation. *Morgan v. United States*, 103 U. S. 477. The bonds themselves make reference to the act of February 21st, 1870, and

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also to the mortgage, or deed of trust, by which they are secured. This also imputes knowledge, no doubt, of the contents of the mortgage.—Jones on R. R. Securities, § 299. This instrument provides, that the entire principal and interest shall become due and payable, within ninety days after a refusal to pay the semi-annual interest due by said coupons, *after* demand made at the office or agency of said defendant corporation in the city of New York. If it appeared from the testimony in the cause that any holder, at the time of his purchase, knew the fact that there was a refusal to pay after a demand had been made under the terms of the mortgage, it may be admitted that a defense on his part against equities attaching to the bonds in the hands of his immediate vendor would certainly be unavailable. But this is an extrinsic fact foreign to the face of the paper. It is not a mark on the instrument, but a latent fact outside of it. It does not, therefore, operate to dishonor the paper on the face of it, so as to openly disgrace it in the hands of the holder. The law does not charge him with notice of this fact, unless he either knows it, or exhibits bad faith by intentionally avoiding a knowledge of it. We mean, of course, by knowledge, information imputed by law, which may be constructive as well as actual. Under the rule which we have above discussed and adopted, the failure to present overdue coupons, before the maturity of the bond itself to which they are attached, does not dishonor the paper on its face. Ignorance of the fact of such demand, therefore, is not necessarily imputable to bad faith by reason of a neglect to make inquiry, or evidence conclusive of fraudulent intent. It does not, standing alone, show that the holder was sufficiently put on inquiry that there was something wrong about the title of the paper, or, using the language of Lord Ellenborough in *Tinson v. Francis*, 1 Camp. 19, that the paper had come disgraced into the hands of the purchaser.

It is true, as asserted in argument, that all of the litigants admit in the pleadings that there was such a demand and refusal to pay, and that thereby the principal of the bonds became due in the year 1872, as well as the entire interest; but this is not an admission that they knew this to be true at the time of their respective purchases,—a fact which is negatived by an express denial of all notice. When it was shown that a fraudulent use had been made of the bonds, the burden was on the holders to show that they were *bona fide* purchasers for value in due course of trade. This proof being made, the burden was again shifted on those assailing the validity of the bonds to prove notice to the purchaser of any alleged defect in the title of the transferrer. The fact of such notice has reference to the time of the purchase, and not afterwards; and time is,



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therefore, of the very essence of such proof, and a part of it. The principal of the bonds, in our opinion, could not be considered as having matured, within the meaning of the law-merchant, and so as to vitiate the holder's title, when the fact of such maturity depended upon an extrinsic circumstance of which the holder knew nothing, either actually or constructively. Such a rule would be repugnant to the most fundamental principles of our entire system of commercial law, which is based on the policy of affording full protection to innocent purchasers.

It is further contended that such of the bond holders as purchased after March 17th, 1875, were charged with notice of the fact that the bonds had been dishonored from refusal to pay, because on that day the General Assembly of Alabama in effect repudiated the liability of the State, as indorser of the bonds, by repealing the act of February 21st, 1870, under which the indorsement was made, and by which provision was made for their future payment by the State, in the event of a default of payment by the railroad company as maker.—Acts 1874-75, p. 269. This being a public law, a knowledge of which was imputable to every holder of these bonds; the law repealing it was equally so, and was a fact of which no holder had a right to be ignorant. There was no other manner in which the State could constitutionally and authoritatively declare its *status* and purposes on the subject, than by speaking through a public law. The effect of this repealing law was to withdraw from every State official all authority to proceed under the abrogated law to make payment of the bonds in any event. It was alone by virtue of the provisions of this law that the Governor was authorized to negotiate temporary loans, if needed, to pay the interest on them. It was by a like authority, and that only, that the Auditor of the State was empowered to draw his warrant upon the treasury of the State, for the purpose of paying such interest, in the event of a failure of the railroad company to make provisions for its prompt payment.—Acts 1869-70, sec. 4, p. 153. The constitution and laws of the State provide, in plain terms, that no money shall be paid out of the treasury except upon appropriation made by law, and on warrant drawn in pursuance thereof by the proper officer, who is designated, *eo nomine*, to be the Auditor.—Const. 1875, Art. IV, § 33; Code, 1876, §§ 85, 187. Whether this repealing act was strictly an open repudiation by the State of its liability as indorser of these bonds, such as to dishonor them *ipso facto*, we need not decide. It was certainly a significant circumstance, sufficient to put the purchaser on inquiry, and charge him with notice of the fact that there was something wrong about the bonds; especially when taken in connection with the other fact, that, at the time of such repeal, several

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years of overdue coupons remained unpaid, and were attached to the bonds.

In applying the foregoing principles, we need not enter into any protracted discussion of the testimony. The chancellor, in our opinion, has properly found that J. & W. Seligman & Co. were *bona fide* purchasers for value, and before maturity, of the forty-seven bonds held by them, without notice of any existing infirmity of title. The evidence is, in our minds, satisfactory to show that they became purchasers of these bonds prior to March 17th, 1875, when the act of February 21st, 1870, was repealed. The fact of the coupons for four years being overdue and unpaid, was not alone sufficient to impute bad faith to the holders in their failure to make inquiry as to the real *status* of these bonds; nor was the fact sufficient to dishonor the paper, when taken in connection with the other facts of the case known at the time to such purchasers.

Perkins, Livingston & Post are shown to have purchased their two bonds in April, or May, of the year 1877, and, therefore, after March 17th, 1875. Eleven coupons were then overdue upon them. The chancellor erred in decreeing that they were *bona fide* purchasers for value without notice.

He likewise erred, under the foregoing principles, in holding W. S. Nickols to be entitled to protection as an innocent purchaser of the ten bonds bought by him in February, 1883, for which he paid only twenty cents on the dollar.

The same we hold to be true as to his finding as to the fifty bonds owned by A. W. Jones and his associates, and purchased in 1884 from Levy, who himself bought from Barlow after February, 1880. It needs no argument to show that Barlow, as Crawford's administrator, held no better title than Dupuy; and we have shown that, in his hands, all of these bonds were subject to existing equities in favor of the State.

The above named parties, not being *bona fide* purchasers for value, in due course of trade, without notice, are not entitled to be subrogated to the statutory lien of the State as indorser of these bonds. But they will be allowed to come in subordnately with the other creditors, in like condition as being secured by the mortgage, or deed of trust executed by the defendant corporation to the Union Trust Company of N. Y.

We find no other errors in the decree of the chancellor.

The decree will be reversed, and a decree rendered in this court, in substance the same as that rendered by the chancellor, except as to the errors above pointed out.

The costs of the case in this court, and in the court below, so far as they remain unpaid, will be paid out of the proceeds of the sale of the road, its franchises and other property, included in the deed of trust and prayed to be sold.

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SOMERVILLE, J.—An application is made in this cause, by the attorneys of Morton & Bliss, for the allowance to them of counsel fees, to be paid out of the general fund which may accrue from the sale of the property, which is declared to be subject to the lien of the mortgage described in the pleadings. A like application is also made in behalf of the counsel for the complainant in the original bill, who sues as a judgment-creditor of the defendant railroad company.

We are also asked to modify the decree, so as to allow to Seligman & Co. the right to prove for the full amount of the forty-seven bonds held by them as collateral security, and to permit them to retain so much of the proceeds of these bonds as they may recover, not in excess of the debt for the security of which the bonds were received.

We propose to first consider the questions involved in the last suggestion.

1. It is decided that Seligman & Co. are *bona fide* holders of these bonds, without notice of any infirmity of title attaching to them, and that as such they are entitled to protection as purchasers for value, having received them as collateral security pursuant to an agreement made at or before the time of advancing their money upon them. The face value of these collaterals is greatly larger in amount than the debt secured by them.

The pledgee of negotiable paper, who is a *bona fide* holder for value, and before maturity, is practically the owner of such paper, and is entitled to be protected to the extent of his debt, as fully as if he were the owner. He may, ordinarily, sue on such collaterals in his own name, and, in the absence of any defense, is entitled to recover for their full amount. From the sum thus recovered he can rightfully deduct his debt, with interest and costs, and the surplus he holds as trustee for the pledgor.—Jones on Pledges, §§ 89, 669–670; Colbrooke on Collat. Sec., §§ 85, 87, 90, 143; *Tooke v. Newman*, 75 Ill. 215.

Where the negotiable paper, which is thus pledged, is without consideration, or is subject to prior equities, or has been fraudulently misappropriated, the pledgee, if a *bona fide* holder for value before maturity, may nevertheless prove or sue for the entire amount of the collaterals, but can recover no surplus over and above the amount of his debt or advances, with proper costs of suit. He is the pledgee of the entire debt or demand represented by the collateral transferred to him, and not of a mere fractional part of it. The primary purpose of the pledge was to place in his hands the means of paying his debt. If he is permitted to prove only for an undivided or fractional part, it must be upon the theory that he is the transferee of an interest less than the whole. The true intention



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of the contracting parties can be carried out, only by giving the pledgee the full indemnity afforded by the collaterals held by him in pledge, to the extent of his debt or advances.—Colbrooke on Collat. Sec., §§ 78, 92, 70, 143, 177; *Swift v. Smith*, 102 U. S. 442; *Davis v. Leopold*, 87 N. Y. 620; *Railroad Co. v. Nat. Bank*, 102 U. S. 14; *Fisher v. Fisher*, 98 Mass. 303; *Union Nat. Bank v. Roberts*, 45 Wis. 373.

In *Stoddard v. Kimball*, 6 Cush. 469, the plaintiff sued as pledgee of a negotiable note, which had been transferred to him as collateral security for a debt less in amount. The transfer or pledge was made in fraud of the indorser and other parties to the paper. The facts showing him to be a *bona fide* purchaser before maturity, it was held that he could recover so much of the note as would satisfy his claim for which it was pledged as security. SHAW, C. J., said: "It being obvious that the plaintiff can recover nothing as trustee for the party from whom he received it (*i. e.*, the collateral), he is liable over to nobody for the surplus, and therefore can have judgment only for the amount due to himself, for his own use, and in his own right, which is so much of the note as may be necessary to satisfy the balance of the debt, for the security of which he received it."

In *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40, a like ruling was made, the plaintiffs being held entitled to recover "to the amount of the note, for which they took the note in suit as collateral security."

In *Duncomb v. New York R. R. Co.*, 84 N. Y. 190, where a railroad mortgage had been foreclosed by trustees, and numerous pledgees of bonds appeared, holding them as collateral security for debts due from third persons, they were allowed to prove for the full amount of these bonds; but their recovery was limited to the amount of the claims for the security of which they respectively held these collaterals. This ruling of the referee was approved by the court, without so much as questioning its correctness.—See, also, *Williams v. Smith*, 2 Hill (N. Y.), 301; *Allaire v. Hartshorn*, 21 N. J. L. 663; Colbrooke on Collat. Sec., §§ 78, 92; Jones on Pledges, § 674.

In England, the more recent rule in bankruptcy, based on general principles of equity, is to permit the holders of collateral securities, who are *bona fide* purchasers for value, to prove for the whole amount of such collaterals, with this limitation only, that they can not receive dividends in excess of the debt for the security of which such collaterals are held. And this rule applies where the paper pledged has been fraudulently issued, or is otherwise without consideration.—*Ex parte Newton*, 16 (L. R.) Chan. Div. 330 (1880–81); *In re Gomersall* 1 (L. R.)

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Chan. Div. 137 (1875-76) ; *Ex parte Cook*, Montagu's Rep. 228.

If this were not the rule, the absurd result would follow, that one pledgee, who holds *one hundred* bonds, of one thousand dollars each, for example, would be no better secured than another who holds only *one* of such bonds, the debt secured being, we will say, one thousand dollars. Can a rule be sound which would produce this strange sequence? Would it comport with the fundamental principles commonly supposed to govern the rights of transferees of commercial paper, that the purchaser of a hundred bonds will obtain no more of value, nor better indemnity, than the purchaser of one bond of the same kind and denomination, when the very intention of the contracting parties may have been the contrary? Such is not our view of the law.

These conclusions are not, in our judgment, affected by the rule of subrogation prevailing in this State.

Under the influence of these principles, it is perfectly clear that Seligman & Co. should be permitted to prove for the entire amount of the collaterals held by them; but the amount of their recovery can not exceed the debt for the security of which these collaterals are pledged, with lawful interest added.

2. It is equally clear, in our opinion, that the right of the pledgees, Seligman & Co., can not be extended so as to give them a lien on these bonds for counsel fees, incurred by them in this litigation. They are holders for value, only to the extent of their advances on these bonds, and interest. Counsel fees can form no part of this debt, because they accrued as an independent obligation, and after the pledge was made, and the bonds were never transferred with any intention of securing such a claim. The precise question arose in *Bank v. Hemingway*, 34 Ohio St. 381, and was decided as we have above held. It was said by the court that, "as against the maker, who has a valid equitable defense to a note in the hands of the payee, if the latter pledges it as security for a debt, the pledgee can only be regarded as a *bona fide* holder of the note to the extent of his interest at the time he acquires the title, or has notice of the defense to it. If the pledgee sues the maker upon the note, the latter may attempt a complete defense, without, in case of failure, thereby incurring a liability to pay the pledgee anything in addition to the amount of the debt secured by the note." There are cases, perhaps, we may add, where the pledgee, suing to enforce the collection of a collateral, has been permitted to deduct counsel fees from the amount realized by suit; but this would be at the expense of the pledgor, and not of an innocent third person, who could in no wise be responsible for so extraordinary an expenditure.

3. We come next to consider the claim of counsel fees, which

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we are urged to allow in the present suit. It is our opinion, that the present case is not one in which such a claim can be charged against the general fund which may be realized from the sale of the mortgaged property. The fundamental principle on which such allowances are justified is, that a trust estate should bear the expenses of its administration in a court of equity. Where a trustee, acting with fairness and impartiality, resorts to necessary litigation in order to rescue a trust estate from waste or destruction, and succeeds by his efforts in doing so, he is entitled to reimbursement out of the fund itself, for reasonable expenses incurred in prosecuting such suits, including a proper sum for attorney's fees. A like rule is applicable, where a creditor institutes a suit in equity, not exclusively for his own benefit, but for the joint benefit of himself and other creditors of the same class to which he belongs. It will be observed that the co-complainants, in suits of this nature, all have a similar interest in the subject-matter of litigation—a common, and not an antagonistic interest in the trust fund, which has been brought under the control of the court. The necessary expenses of the original complainant incurred in litigation may very well, under these circumstances, be made payable out of the common fund, or else all, who are permitted to come in and avail themselves of the benefit of his labor, be required to contribute proportionally to such expense, as a condition of receiving such benefit. It would be inequitable for one alone to bear the burden, and others to come in and reap the fruits. The fruits of the litigation enuring equally to the benefit of the whole class concerned, they are equally taxable with the costs and expenses. The services of the counsel employed constitute a necessary part of such expenses. The attorneys for the original complainant are also the attorneys for all who unite with him in the suit, or who afterwards are permitted by the courts to come in, and participate in the fruits into which the proceeding may ripen.—*Trustees v. Greenough*, 105 U. S. 527; *Railroad and Banking Co. v. Pettus*, 113 (Wall.) U. S. 116; *Grimball v. Cruse*, 70 Ala. 534. Unless this relation exists, the court will not be justified in making counsel fees a burden on the trust fund, merely because the services rendered by such counsel incidentally enure to the benefit of all the creditors who succeed in establishing their claims.—*Lehman v. Tallassee Man. Co.*, 64 Ala. 567.

The largest preferred claim which has been allowed in the present case is that of Gilman, Sons & Co., who are decreed to be entitled to the lien secured by the statutory mortgage of the State of Alabama. Any fees taxed on the proceeds of sale would probably be largely at their expense. The only other party holding a like priority are Seligman & Co., whose attor-



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neys are urging this allowance. These attorneys, as well as those of Robertson—the complainant in the original bill—have antagonized the claim of Gilman, Sons & Co., with uncommon diligence and vigor. The theory upon which Robertson's bill was based is the supposed invalidity of this claim, and of all others, as incumbrances upon the property in litigation. The chief effort of the learned solicitors of Morton & Bliss has been to overthrow the priority accorded to it by the first decision of this court in the cause. In proportion as the services of these attorneys have been valuable to their clients, they have been detrimental to the adversary party, whose rights they have assailed with such marked energy and perseverance. It is our judgment, that no allowance can be made out of the trust fund going to Gilman, Sons & Co., as attorney's fees for the applicants.

We will modify the decree, however, so as to allow the attorneys of Morton & Bliss to make application to the chancellor for the allowance to them of reasonable counsel fees out of any fund that may be left after paying the costs of suit, and discharging the claims of Gilman, Sons & Co., and that portion of the claim of Seligman & Co., which constitutes a first lien on the property in controversy, in the event that there may be a surplus going to those creditors who hold a second lien under the deed of trust executed to the Union Trust Company, and who come in under the cross-bill of Morton & Bliss and belong to the same class.

4. The rule which we have announced in the decree rendered in this cause, as to the distribution of the fund, is, in our opinion, unquestionably correct. Where bonds, or other evidences of debt, are secured by mortgage liens, on property of any description, and a fund is realized by a sale of such property, the established rule, universally adopted by courts of equity, is, that the distribution of it must be *pro rata* among lien-holders of equal priority, the surplus to be distributed in like manner among those coming next in order. This is perfectly equitable, and any other rule would be in disregard of the favorite maxim of courts of chancery, that "equality is equity." The principle invoked in the distribution of money among execution creditors at law has no application to cases like the present.—Colbrooke on Collat. Sec., § 159; 1 Story's Eq. Jur., §§ 554, 553. Nor is the rule different, because the first lien-holders derive their rights from a mortgage created by statute in favor of the State. Such a mortgage is nevertheless a contract lien, and not a pure statutory one, like that of a judgment or execution.



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## ACCOUNTS.

1. *When account becomes stated.*—A statement of his accounts by the tax-collector, prepared by him and submitted to the complainant, does not become a stated account, unless retained without objection within a reasonable time; and where it involves transactions extending through a period of nine years, and involving more than six hundred thousand dollars, its retention for thirty-five days before filing the bill is not unreasonable. *Lott v. Mobile County*, 69.

## ACTION.

1. *Action by State; instructions of governor to attorney-general.*—When an attachment is sued out in the name of the State, by the attorney-general, it is not necessary that he should exhibit the written instructions of the governor for the institution of the suit (Code, § 2902); if such instructions were not in fact given, the objection should be taken by motion to dissolve the attachment, before joining issue. *Wolfe v. State*, 201.
2. *Action against person receiving public moneys with notice of their character.*—Money being deposited in bank by a tax-collector, to the credit of "I. H. Vincent, treasurer," and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way; these facts are sufficient to charge the indorsee with notice of the official character in which the treasurer held the funds; and if he applies the money in payment of an individual indebtedness of the treasurer to him, he becomes liable to the State, as a trustee *in invitum*, in an action for money had and received. *Ib.* 201.
3. *Same; ratification of unauthorized act.*—The institution of such action in the name of the State, by the direction of the governor, does not amount to a ratification of the illegal act, nor discharge the liability of the treasurer himself; nor is any special legislative sanction necessary to authorize or sustain the action. *Ib.* 201.
4. *Election of remedies in case of wrongful payment.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety; and he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment. But, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor; and the holder of a bill of exchange, to



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- whom it has been transferred as collateral security by the payee, does not forfeit his right of action against the other parties, by an unsuccessful suit against one. *Williams, Deacon & Co. v. Jones*, 119.
5. *Remedies of holder, against prior parties to bill of exchange.*—The holder of a bill of exchange may maintain, at the same time, separate actions against the acceptor, the drawer and the payee, their liability being fixed by proper protest and notice, and nothing but a payment of the judgment against one will discharge the others; and where the bill is held as collateral security for prior advances made to the payee, he may maintain an action against the acceptor in the name of the payee. *Ib.* 119.
  6. *Action against municipal corporation, for water supplied for sanitary purposes; contract ultra vires.*—The defendant in this case, a municipal corporation, having power under its charter to contract with plaintiff for a supply of water to be used in flushing sewers and extinguishing fires, an action lies to recover the agreed price of the water supplied and used in any one year, without regard to the power of the corporate authorities to enter into a valid contract for water for a term of twenty years or more. *City Council v. Water-Works Co.*, 233.
  7. *When action lies for money had and received.*—An action lies for money had and received, whenever the defendant has in his hands money belonging of right to the plaintiff, and privity of contract is not necessary to support it. *Lerinsdon v. Edwards*, 293.
  8. *Action by landlord, against purchaser of tenant's crop.*—A landlord, having a statutory lien on his tenant's crop for the rent of the land, may maintain an action for money had and received, against a purchaser who, having notice of the lien, receives and sell the crop. *Thornton v. Strauss & Steinhardt*, 164.
  9. *Action by mortgagee, against purchaser of crops.*—A mortgage of crops not yet planted, if duly recorded in the county in which the lands lie, is constructive notice to a purchaser of the crops after they have been gathered; and he is liable to the mortgagee in trover, or a special action on the case. *Smith v. Fields*, 336.
  10. *Action by tax-collector against his successor, for fees collected.*—A late tax-collector may maintain an action against his successor, for fees collected, on proof that the defendant acted as his agent, express or implied, in collection of the fees; or, without such agency, on proof that he performed the services for which specified fees were given by law, complying with all the requisitions of the statute, and that the defendant collected the fees. *Shields v. Sheffield*, 91.
  11. *Same; estoppel against agent.*—If the defendant acted as the plaintiff's agent in collecting the fees, he would be estopped from denying the liability thereby fastened upon him, or asserting that plaintiff had not complied with the law; but, the question of agency *vel non* should be submitted to the jury. *Ib.* 91.
  12. *Action by county, on bond of bridge contractor.*—When a bridge has been erected under contract with the county commissioners, and bond taken from the builder conditioned to keep it in good repair for five years (Code, §§ 1692-93), that court may notify and require the builder to repair it, and, in the event of his refusal or neglect to do so, maintain an action on the bond, in the name of the county, without previous information or complaint by a freeholder of the county. *James v. Conecuh County*, 304.
  13. *Action against railroad company, for injuries to horse at crossing.*—A railroad company is not liable for injuries to a horse caused by its foot being caught between a projecting spike and one of the iron rails of the track, at a private crossing erected by third persons, which is not shown to have ever been used or repaired by the

ACTION—*Continued.*

- railroad company, nor to have been serviceable to it in any way. *Pratt Coal & Iron Co. v. Davis*, 309.
14. *Statutory action by owner, for damages to trespassing animals.* Where lands are not inclosed by a lawful fence (Code, §§ 1586-7), the rights of the owner, as against cattle or stock running at large, are only defensive: he may have the trespassing animals estrayed, and may use all proper means to drive them out of his field, taking care to employ no unnecessary force; but, for any injury which is the natural or proximate consequence of a wrongful act on his part, outside of these defensive measures, he is liable to the statutory penalty of five times the amount of the injury. *Wilhite v. Speakman*, 400.
  15. *Same; case at bar.*—The plaintiff's horse having been caught by the defendant while trespassing in his field, which was not inclosed with a lawful fence, and tied with a rope to the limb of a tree, where he was found dead the next morning, the appearances indicating that he had been choked to death; the liability of the defendant to the statutory penalty does not depend on the question of negligence *vel non* in the treatment and care of the horse, but, his act being unlawful, on the question whether the death of the animal was the natural and proximate consequence thereof. *Ib.* 400.
  16. *Commencement of action; declaration and notice.*—In an action of ejectment proper, the declaration and notice serve the purpose of a summons and complaint; and the commencement of the action dates, not from the time they are served on the defendant, but from the time they are placed in the hands of the sheriff to be served; and this will be presumed, in the absence of evidence to the contrary, to be the day on which the notice bears date. *Ware v. Swann & Billups*, 330.

## ACTS OF CONGRESS.

1. *As to transfer of seamen's advance notes for wages.*—The provisions of the act of Congress of June 7th, 1872, regulating the transfer of notes given for seamen's wages in advance (U. S. Rev. Stat., §§ 4532, 4534), have no application to seamen employed in foreign vessels. *Levinshon v. Edwards*, 293.
2. *Grant of lands for railroads; title of State; limitation of action.* The title to the lands embraced in the grant by Congress to the State of Alabama, for the benefit of certain railroads (11 U. S. Stat. at large, p. 17), was vested in the State as trustee, until the completion of the railroad, except as to the lands embraced in the first continuous length of twenty miles, which might be sold at an earlier day; and the statute of limitations not running against the State while the lands were so held, it did not begin to run against the railroad company until, by the completion of the road, it acquired the right to sue. *Ware v. Swann & Billups*, 330.

## ADVERSE POSSESSION.

1. *As between administrator and heirs.*—When an administrator takes possession, in his representative capacity, of his intestate's lands, his possession is not adverse to the heirs, and the statute of limitations does not begin to run in his favor, as against them, until there is a public or notorious change in the nature of his holding; and the fact that he sold the lands under a probate decree, becoming himself the purchaser, does not render his subsequent possession adverse to the heirs, when it is not shown that the sale was ever reported and confirmed, and a conveyance executed to him under the order of the court. *Comer v. Hart*, 389.

ADVERSE POSSESSION—*Continued.*

2. *Continuity of inclosure.*—Possession, such as may ripen into a title under the statute of limitations, must be continuous, and must be evidenced by acts suitable to the character of the lands; and where they consist of open, uninclosed suburban lots, susceptible of cultivation, and are cultivated each year, the continuity of the possession is not destroyed because the fences, when not necessary for the protection of the crops, are suffered to become dilapidated. *Hughes v. Anderson*, 209.
3. *Tax-deed as color of title.*—A tax-deed, though invalid as a muniment of title, may give color of title, and operate to fix and define the boundaries of an actual possession. *Ib.* 209.

## AGENCY.

1. *Liability of railroad company for wrongful acts of agents or servants; vindictive damages.*—A railroad corporation is liable for all acts of wantonness, rudeness or force, done or caused to be done by its agents or servants, in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons. *L. & N. Railroad Co. v. Whitman*, 328.
2. *Entries on book by agent; admissibility as evidence against principal.* Entries on the books of the carrier, made by his authorized agent in the regular course of business, and at the time the goods are received, are admissible evidence against the carrier, as forming a part of the *res gestæ* of the fact of delivery. *L. & N. Railroad Co. v. McGuire & Co.*, 396.
3. *Estoppel against agent.*—If the defendant acted as the plaintiff's agent in collecting fees, he would be estopped from denying the liability thereby fastened upon him, or asserting that plaintiff had not complied with the law; but the question of agency *vel non* should be submitted to the jury. *Shields v. Sheffield*, 91.
4. *Liability of master for negligence of servant.*—A gas company having exclusive possession and control of the side-track of a railroad adjacent to its works, for the receipt and delivery of coal, and having employed an adjoining proprietor to unload the coal delivered on a train of cars; if the cars, when unloaded, are negligently placed or left by said proprietor's servants so near the main track of the road as to cause a collision with a passing train, he and his employer, the gas company, are jointly liable to the railroad company for the damages thereby caused. *M. & E. Railway Co. v. Chambers & Abercrombie*, 338.
5. *Deed of railroad corporation, executed by agent; consideration.*—Held, re-affirming *Standifer v. Swann & Billups* (78 Ala. 88), that a conveyance of lands which belonged to the Alabama & Chattanooga Railroad Company, executed by J. C. Stanton as general superintendent and attorney in fact, without written authority from the board of directors, or other governing body of that corporation, passed no title or estate of which a court of law could take cognizance; that if the corporation be held to have ratified the act of such agent in making the sale and conveyance, by its knowledge of the facts and its failure to dissent, such ratification could only operate as an equitable estoppel, which is not cognizable at law. *Ware v. Swann & Billups*, 330.

## AMENDMENT.

1. *By striking out name of defendant improperly joined.*—On the death of one of several joint obligors, the remedy for a breach necessarily becomes several, in the absence of a statute authorizing a



AMENDMENT—*Continued.*

joint action against the survivors and the personal representative of the deceased; but, if the personal representative of the deceased is improperly joined as a defendant with the survivors, his name may be struck out by amendment, or a discontinuance entered as to him, without thereby discontinuing the action as against the others. *Reed v. Summers*, 522.

2. *Attachment in justice's court; what defects are amendable.*—In an attachment case, commenced in a justice's court, and removed by appeal into the Circuit Court, the attachment can not be quashed or dismissed "for any defect of form in the affidavit," &c. (Code, § 3693); but the statute does not apply to defects of substance. *Knowles v. Steed*, 427.
3. *Amendment of verdict.*—When the verdict of the jury is not in proper form, the court may inform them of the defect, before they are discharged, and instruct them to retire and consider further of it; and the defendant can not complain of this action. *Allen v. State*, 34.

## ARBITRATION.

1. *Appointment and substitution of arbitrators.*—When only one of the persons originally named as arbitrators acts, and the appointment of the others as substitutes is not made by him by memorandum entered on the submission, nor by the parties themselves in writing, the proceedings do not conform to statutory requisitions (Code, § 3540); and the award can not be entered up as the judgment of the court, except by consent. *Dudley v. Farris & McCurdy*, 187.
2. *Submission without order of court.*—A submission of the matters in controversy in a pending suit to arbitration, without an order of court, is not a statutory arbitration; nor can the award be entered up as the judgment of the court, against the objection of one of the parties. *Ib.* 187.
3. *Entering award as judgment of court.*—When an award is rendered in substantial conformity with the statutory provisions authorizing the submission of pending suits to arbitration, and is not performed within the time specified, it is the duty of the judge or chancellor to enter it up on motion, as the judgment or decree of the court (Code, § 3537); but the statute does not apply to a common-law award, which can only be entered up as a judgment on consent of parties given *in judicio*. *Ib.* 187.
4. *Same; remedy on refusal.*—An appeal is given by statute (Code, § 3547) from a judgment setting aside an award, or entering it up as the judgment or decree of the court; but not from the refusal of the chancellor to enter up the award as the decree of the court, which is merely an interlocutory order: *mandamus* is the only adequate and appropriate remedy to revise his action. *Ib.* 187.
5. *Arbitration of pending suit; construction and effect of unexecuted agreement.*—An agreement to submit a controversy to arbitration, not consummated, does not oust the jurisdiction of the courts, at the instance of either party; and where the matters in controversy in a pending suit are submitted for decree "on the basis of an agreement" between the parties, by which it is stipulated that, as to a part of the amount claimed by plaintiff, which was to be submitted to arbitration, "no collection shall be made until the decision of said arbitrators, provided such decision is made by" a certain day, this does not prevent the reduction of the demand to judgment by the decree of the court. *Winter v. City Council of Montgomery*, 487.

## ASSIGNMENT.

1. *Assignment of printed "labor tickets."*—The printed certificates sued on in this case, issued by the defendant corporation, or by its authority, and denominated "labor-tickets," being made payable on their face "to employees only," and declared to be "not transferable," will not support an action by an assignee in his own name. *Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co.*, 377.
2. *Same.*—Such restriction on the transfer of the certificates is not contrary to any principle or policy of the law, but negatives the idea that they were intended to circulate as change-bills, and prevents a discount or set-off against the original party from becoming unavailable. *Ib.* 377.
3. *Assignment of mortgage and purchaser's note, after maturity of rent-obligation.*—An assignment by the vendor, after the maturity of the purchaser's obligation to pay rent, of the mortgage and secured note for the unpaid purchase-money, does not carry with it, as an incident, the right to the rent then past-due, nor take away the vendor's right of action as landlord; but, if it were shown that the purchase-money had been paid in full to the assignee, under a redemption or foreclosure of the mortgage, this would be a complete defense to a subsequent action by the vendor, founded on the rent-contract, or on his lien as landlord. *Thornton v. Strauss & Steinhardt*, 164.
4. *Assignment by widow, of purchaser's certificate for sixteenth-section lands.*—On the death of the purchaser of sixteenth-section lands (Code, § 988), while in possession under his certificate, his widow has no authority, as such, to indorse or assign the certificate to another person; and his administrator may recover the lands in ejectment against her assignee, or a sub-purchaser from him, notwithstanding the issue of a patent to the assignee. *Watson v. Prestwood & Fletcher*, 416.
5. *Assignment of written obligation to convey interest in land; right of assignee to specific performance.*—When the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time; the bond being made payable to the projectors by name, "their associates and successors," and duly assigned by them to a corporation, by which the road was built as stipulated, that corporation may maintain a bill for the specific performance of the contract.—*Wilks v. Ga. Pacific Railroad Co.*, 180.

## ATTACHMENT.

1. *Affidavit as to removal of crop.*—An affidavit for an attachment at the suit of the landlord, on the ground that a part of the crop has been removed without his knowledge or consent (Code, § 3472, subd. 2), must allege that it was removed from the rented premises, or it is substantially defective. *Knowles v. Steed*, 427.
2. *Attachment in justice's court; what defects are amendable.*—In an attachment case commenced in a justice's court, and removed by appeal into the Circuit Court, the attachment can not be quashed or dismissed "for any defect of form in the affidavit," &c. (Code, § 3693); but the statute does not apply to defects of substance. *Ib.* 427.
3. *Same; objections before justice.*—In such appeal case, "no objection can be made in the appellate court to the regularity of the

ATTACHMENT—*Continued.*

proceedings, which was not made before the justice of the peace'' (Code, § 3693); but, formal pleadings not being required in a justice's court, it is enough if it appears that objection was in fact made. *Ib.* 427.

4. *Same*; *contesting garnishee's answer*; *tendering issue*; *judgment by default*.—When the answer of a garnishee, denying an indebtedness, is contested, and the issue is decided against him by the justice, from whose decision and judgment he takes an appeal; the case stands in the Circuit Court as if there had been no judicial action on the contest, and the plaintiff must tender an issue in writing; and such issue not being tendered, he can not claim a judgment by default. *Lehman, Durr & Co. v. Hudmon Bros.*, 532.
5. *Attachment by State*; *instructions of governor to attorney-general*. When an attachment is sued out in the name of the State, by the attorney-general, it is not necessary that he should exhibit the written instructions of the governor for the institution of the suit (Code, § 2902); if such instructions were not in fact given, the objection should be taken by motion to dissolve the attachment, before joining issue. *Wolffe v. State*, 201.

## ATTORNEY AT LAW.

1. *Advice of counsel, as defense to action for malicious prosecution*. That the prosecution was instituted by the advice of counsel, given on a full and fair statement by the prosecutor of all the facts known to him, or which by proper diligence he could have ascertained, is a full defense to the action, though the advice was erroneous, or was not warranted by the facts stated; but, if the prosecutor failed to disclose any material fact known to him, he can not shelter himself behind the advice of counsel founded on a partial statement. *Steed v. Knowles*, 446.
2. *Allowance of counsel fees out of funds in court*.—When a trust fund is brought into court, under a bill necessarily filed by a trustee to preserve the estate from waste or destruction, he is entitled to an allowance for reasonable counsel fees, as part of the necessary expenses of the suit; and when a creditor files a bill in equity, for the joint benefit of himself and other creditors, counsel fees are properly charged on the common fund brought into court, or apportioned among the several creditors who claim the benefit of the decree. But the principle can not be extended to a bill filed by a judgment creditor of an insolvent railroad corporation, seeking to set aside an assignment of its property by deed of trust for the benefit of certain bondholders, which deed is held valid, the bondholders allowed to come in and prove their claims, their equities and priorities adjusted, and the deed enforced and foreclosed for their benefit; though, after satisfaction of the claims adjudged to constitute a first lien on the property, the attorneys of creditors holding a second lien, who filed the cross-bill for the enforcement and foreclosure of the deed, may ask an allowance for reasonable fees out of the residue of the fund distributable among creditors holding a second lien. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
3. *Same*.—Counsel fees incurred by the holder of bonds so transferred, in the suit to foreclose the deed of trust, not being a part of the debt for which the bonds were transferred as collateral security, can not be allowed as part of the amount for which they are entitled to prove, over and above the amount of their debt. *Ib.* 590.



BAIL. See CRIMINAL LAW, 11-13.

BAILMENT. See COLLATERAL SECURITY; COMMON CARRIERS.

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Accommodation indorser*.—An accommodation indorser of a note is liable to the holder, who has taken the note for value, before maturity, in good faith, and without notice of any fraud or equity which would vitiate it, precisely as if he had received value for his indorsement; and the fact that the holder knew, when he took the note, that the indorsement was for accommodation only, does not affect the principle. *Marks v. First Nat. Bank*, 550.
2. *Same; taking note in payment of antecedent debt*.—When a creditor takes the note of his debtor, with accommodation indorsements, in payment of an antecedent debt, he is a purchaser for value, in due course of business, equally as if he had advanced money on the faith of it; but the rule is different when such note is taken as collateral security for an antecedent debt. *Ib.* 550.
3. *Same; indorsement before negotiation*.—When a person indorses a note in blank, for the accommodation of the maker, to be used in payment of an antecedent debt due to the payee, he is liable to the payee as an indorser, although the note was never put in circulation by the payee. *Ib.* 550.
4. *Same; fraud of maker as defense*.—If the accommodation indorsement is procured by the fraud of the maker, in concealing a condition annexed to a prior indorsement, the payee not having knowledge or notice of such fraud when he accepts the note as payment, such fraud is no defense to the accommodation indorser. *Ib.* 550.
5. *Conditional indorsements and signatures as sureties; difference between bonds and commercial paper*.—The principle which governs the liability of sureties on bonds conditionally delivered, as asserted in *Guild v. Thomas* (54 Ala. 414), and *Bibb v. Reid* (3 Ala. 88), has no application to commercial paper, in the hands of an innocent purchaser, who acquired it before maturity. *Ib.* 550.
6. *Declarations of bank officer, while negotiating note; admissibility against accommodation indorser*.—The declarations of the cashier of the plaintiff bank, while negotiating with a debtor for the acceptance of his note, with accommodation indorsements, in payment of an existing debt, to the effect that the note would not be accepted without the indorsements of the defendant and another person, are admissible as evidence against the defendant, who afterwards indorsed the note while in the hands of the bank. *Ib.* 550.
7. *Commercial bonds or paper; protection to purchaser*.—A purchaser of negotiable bonds, or other commercial paper, in good faith, for valuable consideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title, or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage, or other security, given for such commercial paper or bond. *Spence v. M. & M. Railway Co.*, 576.
8. *Protection to purchaser of property, or of non-commercial paper*.—On a purchase of property, or of non-commercial paper, information or notice of any fact or circumstance calculated to excite suspicion, and which, if followed up, would lead to the discovery of a latent equity or defect of title, is the equivalent of actual notice. *Ib.* 576.
9. *State-indorsed railroad bonds; rights of purchasers, as against prior equity, or unrecorded mortgage*.—The bonds issued by the M. & M.

BILLS OF EXCHANGE, &c.—*Continued.*

Railway Company, under the authority of the act approved February 25th, 1870, and indorsed by the governor in the name of the State, purporting on their face to be first-mortgage bonds, and referring to the said statute, which required that the first million and a half of said bonds should be used only in purchase and exchange for the bonds of the M. & M. Railroad Company, to whose rights and property said M. & M. Railway Company had succeeded; but containing no reference to the act of August 5th, 1868, under which said M. & M. Railroad was incorporated, by the consolidation of the A. & F. Railroad Company and the M. & G. N. Railroad Company, nor to the charge and incumbrance thereby declared in favor of the creditors of said original companies; and being put on the market for sale, with the State's indorsement; a purchaser might well rely on their recitals, presume that all the requirements of the statute had been complied with, and claim protection against any prior lien or equity in favor of the State or said M. & M. Railway Company. But the acts of the officers and agents of the State, and of said railway company, could not affect the rights of the creditors of said original railroad companies, as preserved and secured by the terms of the consolidation, they not being parties to the chancery suit foreclosing the mortgage, under which said new railway company derived title; and the charge in favor of said creditors being expressly declared by said act of incorporation and consolidation, a purchaser of said new bonds is chargeable with notice of it, although a mortgage securing said debts, as recited in the agreement of consolidation, may never have been recorded, or in fact never existed. *Ib.* 576.

10. *State-indorsed railroad bonds, misapplied by railroad corporation; rights of holders.*—As held in this case on the former appeal (72 Ala. 566), the State-indorsed bonds of the New Orleans and Selma Railroad Company, issued to the company on the completion of the first twenty miles of its road, having been misapplied by it, in violation of the terms of the statute under which they were indorsed (Sess. Acts 1869-70, pp. 149-57), in payment of their debt to the contractor for work done in building said first twenty miles, the indorsement created no liability against the State, while the bonds remained in the hands of the contractor, or of any other person who was chargeable with notice of such misapplication; but, said bonds being negotiable instruments, and governed by the rules applicable to other negotiable paper, the State is liable, as an accommodation indorser, to any *bona fide* holder who acquired the bonds for value, in the usual course of business, without knowledge or notice, actual or constructive, of their original misapplication. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
11. *Same; who are purchasers for value, without notice.*—As to the bonds held by Gilman, Sons & Co. (58, of the 320 issued to the railroad company), and purchased by them from Crawford, to whom they were transferred by the contractor, the court holds, as on the former appeal (72 Ala. 566), that they are *bona fide* holders for value, without notice of the misapplication, although they bought the bonds, at par, in exchange for the bonds of a private construction company which were worth only about ten cents on the dollar; but, as to the bonds held by Morton, Bliss & Co., which were transferred to them by the contractor, in payment for the iron sold by them to him (and used by him in the construction and equipment of said first twenty miles of road), that they are chargeable with notice of the misapplication, and can not be deemed innocent purchasers. *Ib.* 590.

BILLS OF EXCHANGE, &c.—*Continued.*

12. *Same; right of holders under deed of trust.*—Of the holders of the 320 indorsed bonds issued by said railroad company, only those who are purchasers for value without notice are entitled to be subrogated to the statutory lien and priority of the State; but, as against the railroad company, which has waived the defense of a partial failure of consideration, and as against the complainant in the original bill, a subsequent judgment creditor of the railroad company, all are entitled to share in the security afforded by the deed of trust, and to have it enforced for their benefit. *Ib.* 590.
13. *Negotiable bonds, with attached coupons due and unpaid; purchase in good faith, without notice.*—Negotiable bonds not due, with attached coupons past-due and unpaid, do not thereby appear dishonored on their face; but the presence of such unpaid coupons is a material circumstance bearing on the question whether the purchaser acquired them in good faith, and without notice. *Ib.* 590.
14. *Commercial paper; when purchaser is entitled to protection.*—Mere suspicion on the part of a purchaser of negotiable paper, of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith, or something equivalent to it; and while gross negligence is not, of itself, bad faith, it may be evidence of it. *Ib.* 590.
15. *Same; constructive notice; burden of proof.*—The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York; a purchaser having knowledge of such demand and refusal, at the time he acquired the bonds, can not claim to be an innocent purchaser without notice; but, when he has proved the payment of value, the *onus* of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. *Ib.* 590.
16. *Same; constructive notice by public statute.*—The statute approved February 21st, 1870, under which these railroads bonds were indorsed and provision made for their payment, and the repealing statute approved March 17, 1875, being public statutes, every purchaser and holder of the bonds is chargeable with knowledge of their provisions; and although the repealing statute may not amount to an open repudiation by the State of its liability as indorser (a point not decided), "it is sufficient to put a subsequent purchaser on inquiry, and to charge him with notice of the fact that there was something wrong about the bonds, especially when taken in connection with the other fact that, at the time of such repeal, the coupons for several years past-due and unpaid were attached to them." *Ib.* 590.
17. *Transfer of negotiable paper as collateral security.*—When negotiable coupon bonds, or other commercial instruments, are transferred as collateral security, for the repayment of money advanced on the faith of them, the holder should be permitted, on foreclosure of a deed of trust given to secure them and other bonds issued at the same time, to prove for the entire amount of the collaterals so held by him; but he can only recover the amount of his original debt, with lawful interest thereon. *Ib.* 590.
18. *Damages on protest of bill of exchange; as between payee and accommodation acceptor.*—Statutory damages, accruing on the protest of a bill of exchange, are a part of the debt, although an accommodation acceptor is not personally liable for them; yet, being secured by mortgage, so far as the property of the drawer



BILLS OF EXCHANGE, &c.—*Continued.*

- (and principal debtor) is concerned, they must be allowed in the account, under a bill to redeem by the surety, or accommodation acceptor. *Gresham v. Ware*, 192.
19. *Remedies of holder, against prior parties to bill of exchange.*—The holder of a bill of exchange may maintain, at the same time, separate actions against the acceptor, the drawer and payee, their liabilities being fixed by proper protest and notice, and nothing but a payment of the judgment against one will discharge the others; and where the bill is held as collateral security for prior advances made to the payee, he may maintain an action against the acceptor in the name of the payee. *Williams, Deacon & Co. v. Jones*, 119.
  20. *Acceptance of note; when operates as payment.*—The acceptance of a debtor's promissory note does not operate as payment of an antecedent debt, unless it is so received by agreement, express or implied; but the right of action is suspended until the maturity of the note. *Lane & Bodley Co. v. Jones*, 156.
  21. *Same; waiver of lien.*—The acceptance of the debtor's note is not a waiver of the contractor's statutory lien, unless it is received in payment of the debt, or unless the right of action is thereby postponed beyond the time prescribed by the statute for the enforcement of the lien; but the plaintiff can not maintain an action to enforce his statutory lien, without producing and surrendering the note, or satisfactorily accounting for its absence. *Ib.* 156.
  22. *Interest on promissory note.*—A promissory note, payable at a future day, "with interest" at a specified rate, bears interest from date, since it would, without these words, bear interest from maturity. *Cambell Printing-Press Co. v. Jones*, 475.
  23. *Estoppel against denying execution of note.*—When money is placed in the hands of a person to pay a note or draft at maturity, and he refuses to pay on demand by the holder, proof of the execution of the note is not necessary in an action against him, since he is estopped from denying its execution.—*Levishon v. Edwards*, 293.

## BONDS.

1. *Statutory lien created by official bond.*—The lien declared by statute to be created by an official bond (Code, § 403), operates on property acquired by the principal after its execution, and on property acquired by the sureties after his default and before suit brought. *Lott v. Mobile County*, 69.
2. *Enforcement of statutory lien against property of tax-collector and sureties.*—A court of equity will entertain jurisdiction of a bill in the name of the county, against a defaulting tax-collector and the sureties on his official bond, to enforce the lien declared by statute against their property. *Ib.* 69.
3. *Non-joinder of sureties as parties.*—The tax-collector's bond being made joint and several by statute (Code, §§ 2905, 3754), it is not necessary that all of the sureties should be joined as defendants to the bill. *Ib.* 69.
4. *Official bond of county superintendent; filing copy with State superintendent.*—The failure to file a copy of the county superintendent's official bond with the State superintendent of education, as required by law (Code, § 906), is no defense to him or his sureties, in an action for a default; and the court would presume, if necessary, in the absence of averment to the contrary, that a copy of the bond was properly filed and approved. *Reed v. Summers*, 522.
5. *Summary proceeding against defaulting county superintendent of education, and sureties on bond; joinder of administrator with sur-*

BONDS—*Continued*

*vivors*.—On the death of a defaulting county superintendent of education, there is no statute which authorizes a joint action, or summary proceeding by notice and motion, against his personal representative and the sureties on his official bond; and if the personal representative is improperly joined as a defendant in such action or proceeding, his name may be struck out by amendment, or a discontinuance entered as to him. *Ib.* 522.

6. *Same; lies when, and against whom*.—The statute which gives a summary proceeding, by notice and motion, in favor of a county superintendent of education, against his defaulting predecessor, "who has resigned, removed from the county, or been legally removed from office, or whose term of office has expired, and the sureties on his official bond, or any of them" (Code, § 3397, subd. 3), applies also where the defaulter dies before the expiration of his term of office, and authorizes a suit against the surviving sureties alone. *Ib.* 522.
7. *State-indorsed railroad bonds; rights of purchasers*. *Spence v. M. & M. Railroad Co.*, 576; *Morton & Bliss v. N. O. & S. Railroad Co.*, 590. See BILLS OF EXCHANGE AND PROMISSORY NOTES, 7-14.

## BRIDGES.

1. *Action by county, on bond of contractor*.—When a bridge has been erected under contract with the county commissioners, and bond taken from the builder conditioned to keep it in good repair for five years (Code, §§ 1692-93), that court may notify and require the builder to repair it, and, in the event of his refusal or neglect to do so, maintain an action on the bond, in the name of the county, without previous information or complaint by a freeholder of the county. *James v. Conecuh County*, 304.
2. *Same; measure of damages*.—In an action brought in the name of the county, on the statutory bond given by a bridge contractor (Code, §§ 1692-93), the measure of damages would be the reasonable cost of making the repairs necessary to insure the safe condition of the bridge during the period covered by the bond; and if the county has already made the repairs, on default of the contractor after notice, the amount paid, though not conclusive, is a circumstance to be considered by the jury in estimating the value of the necessary repairs. *Ib.* 304.

## CHANCERY.

## JURISDICTION, AND GENERAL PRINCIPLES.

1. *Equitable relief against probate decree, in matter of settlement of administrator's accounts*.—A bill which seeks equitable relief against a probate decree on final settlement of an administrator's accounts, on the ground of alleged errors of law and fact, must negative all fault or negligence on the part of the complainant. *Vincent v. Martin*, 544.
2. *When creditor without lien may come into equity, to set aside fraudulent conveyance*.—By statutory provision (Code, § 3886), a creditor without a lien, or by simple contract only, may file a bill in equity to subject to the payment of his debt property which his debtor has fraudulently transferred, or attempted to transfer; but he can not file such a bill before the maturity of his debt, though he might sue out an attachment at law. *Jones v. Massey*, 370.
3. *Allegations of creditor's bill; certainty and definiteness*.—In a creditor's bill, seeking to set aside a conveyance by his debtor on the ground of fraud, the facts constituting the alleged fraud must be stated, and it is not sufficient to allege, in general terms, that the

CHANCERY—*Continued.*

- debtor has fraudulently transferred, or attempted fraudulently to transfer his property, with the intent and purpose to defraud complainant and his other creditors. *Ib.* 370.
4. *Judgment creditor of insolvent corporation; may come into equity, when.*—A judgment creditor of an insolvent corporation, having an execution returned no property found, may file a bill in equity to reach and subject equitable assets, to remove incumbrances which prevent the enforcement of his judgment at law, and to determine the validity of liens on the property asserted under the incumbrance. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
  5. *Creditors' bill to foreclose deed of trust; parties coming in under decretal order of reference.*—By the settled practice of courts of equity, under a bill to enforce and foreclose a deed of trust for the benefit of numerous creditors, the court may adjust equities and priorities of the different classes of creditors, as represented by the parties then before the court; and those who afterwards come in under the decree and order of reference, and prove their claims, can not complain that this was done before they were in court as parties. *Ib.* 590.
  6. *Distribution of fund among creditors; equitable rule distinguished from legal.*—In a court of equity, where equality as regarded as equity, the principle which prevails at law, as to the distribution of money among execution creditors, is not applied; but the money arising from the sale of property, under a decree foreclosing a deed of trust executed by a railroad company for the security of its bondholders, is distributed *pro rata* among the bondholders entitled to a first lien, and the residue among the bondholders entitled to a second lien, without regard to the time at which their several liens accrued. *Ib.* 590.
  7. *Easement; jurisdiction to enforce.*—When an easement or servitude in lands is created by deed imposing a lawful restriction upon their use, a court of equity will interfere to protect and enforce it by injunction and bill in the nature of specific performance, as between the immediate parties and sub-purchasers with notice. *McMahon v. Williams*, 288.
  8. *Same; condition of forfeiture and reversion.*—A stipulation in such deed providing for a forfeiture and reversion of the granted premises on breach of the condition, is not assignable, but is only available to the grantor or his heirs; and it does not take away the jurisdiction of equity to protect and enforce the easement at the suit of an assignee or purchaser of the dominant estate. *Ib.* 288.
  9. *Injunction against judgment at law.*—A defendant in a judgment at law can not have equitable relief against it, because it is either erroneous or void; since, if void, it may be disregarded, or set aside on motion; and if erroneous, it may be revised on appeal. *Murphree v. Bishop*, 404.
  10. *Injunction of action at law, pending suit for reformation of conveyance.*—When the purchaser of lands enters into possession under a conveyance in which they are misdescribed, and is afterwards sued in ejectment by his vendor, or the statutory action in the nature of ejectment, he may have the conveyance reformed and the action at law enjoined pending the suit; but, if the vendor brings an action of unlawful detainer, in which title can not be inquired into (Code, § 3704), the purchaser can not enjoin the action or judgment while he seeks a reformation of the conveyance. *Ib.* 404.
  11. *Injunction of sale under mortgage.*—On consideration of the voluminous testimony contained in the record of this case, which is



## CHANCERY—Continued.

- conflicting and irreconcilable, and applying to it the settled rule which governs this court in revising the chancellor's decision on disputed questions of fact, the court is satisfied that the chancellor erred in his decree, and that the mortgage was in fact satisfied; and therefore reverses the chancellor's decree, and here renders a decree perpetuating the injunction against the sale under the mortgage, and ordering satisfaction to be entered of record as prayed. *Gilmer v. Wallace*, 464.
12. *Injunction against invasion of private franchise*.—A court of equity has undoubted jurisdiction to restrain, by injunction, an invasion of a franchise lawfully granted, on valuable consideration, by a person or corporation claiming under a subsequent invalid grant. *In re Street Railways Companies*, 465.
  13. *Insolvent estate; removal of settlement into equity*.—To justify the removal of the settlement of an insolvent estate into equity, requires a clear and strong case—a case requiring relief which the Probate Court, on account of its want of equitable jurisdiction, can not grant. *Hardin v. Pulley*, 381.
  14. *Lien for taxes; legal and equitable remedies*.—Taxes levied and assessed create a legal liability, which will support an action at law, although a statutory remedy is also given to enforce their payment; and where the legal remedy is inadequate, as where the owner of the property is a married woman, and the taxes have remained unpaid for a series of years, the lien on the property may be enforced in equity. *Winter v. City Council of Montgomery*, 481.
  15. *Statutory lien of official bond of tax-collector*.—A court of equity will entertain jurisdiction of a bill in the name of the county, against a defaulting tax-collector and the sureties on his official bond, to enforce the lien declared by statute against their property; and such a bill being supported by an independent equity, it is not necessary that it should aver that the accounts are complicated, nor that it should contain the averments necessary in a bill for discovery, or in a bill to surcharge and falsify a stated account. *Lott v. Mobile County*, 69.
  16. *Lien of creditor's bill, as against claim of homestead exemption*.—A bill in equity by a creditor of a married woman, seeking to subject her equitable estate to the payment of a debt created by contract, creates a lien on the property from the service of process; against which lien a claim of homestead exemption can not prevail, unless the right of exemption existed when the bill was filed. *Hines v. Duncan*, 112.
  17. *Purchase by mortgagor at sale under mortgage; limitation of bill to set aside*.—When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, a bill to set aside the sale, and for a redemption and account, filed nine years and ten months after the sale, comes too late; and an alleged offer to account by the mortgagee, made two years after the sale, if it can have the effect to keep the mortgage account open, does not obviate the lapse of time. *Sanders v. Askew*, 433.
  18. *Same*.—If the sale was made without giving notice as required by the terms of the mortgage, it is void, and the legal relation between the parties remains unchanged; and a bill to redeem would not be barred until the lapse of ten years from the surrender of possession. *Ib.* 433.
  19. *Redemption by mortgagor as surety; prior application of property of co-mortgagor as principal*.—When the principal and his surety jointly execute a mortgage to the creditor, conveying lands which belong to them separately, the surety has an equity to require that the lands of the principal shall be first sold and applied to

CHANCERY—*Continued.*

the satisfaction of the debt; and he may, after default, maintain a bill to redeem his land, asking a foreclosure as to the property of the principal, and offering to pay the balance that may remain due. *Gresham v. Ware*, 192.

20. *Merger of legal and equitable estates in mortgagee, by purchase of equity of redemption; intervening equity of surety.*—As a general rule, when the legal and the equitable titles become united in the mortgagee, the mortgage is merged in the unity of possession; but there is no merger, when it is to the interest of the mortgagee that the titles be kept distinct, nor when there is an intervening right in a third person; and when the mortgagee purchases the principal's equity of redemption, without the consent of the surety, the equity of the latter to have the property of the principal first applied to the payment of the common debt will prevent a merger. *Ib.* 192.
21. *Same.*—If the purchase of the principal's equity of redemption is made with the consent of the surety, but under an agreement by the mortgagee to take possession, account for the rent, and sell under the power contained in the mortgage, but with a modification of the prescribed terms, there is no merger, and the equity of the surety remains unimpaired; nor can the terms of this agreement be changed, to his prejudice, by a subsequent agreement between the principal and the creditor, to which he is not a party. *Ib.* 192.
22. *Settlement of partnership accounts by survivor.*—When the surviving partner, having become administrator of the estate of the deceased, makes a settlement of the partnership accounts with the widow, represented by an attorney who has been appointed guardian *ad litem* for the infant distributees; such settlement is not binding on the estate, and is no bar to a bill in equity to compel a settlement. *Vincent v. Martin*, 540.
23. *Rights and remedies of partnership creditors.*—A partnership creditor, as such, has no lien on the partnership assets, though the lien of the surviving partner may, in a proper case, be made available in his favor; yet, if the surviving partner transfers the partnership effects to the personal representative of the deceased, in settlement of the partnership matters between them, this lien is extinguished, and there is none to which a partnership creditor can be subrogated. *Rose v. Gunn*, 411.
24. *Same.*—Although a partnership creditor has no remedy against the partnership effects in the hands of the personal representative and heirs of the deceased partner, to whom they have been transferred by the survivor; yet he may maintain an action at law against the personal representative, or a bill in equity to enforce payment out of the estate of the deceased partner. *Ib.* 411.
25. *Partnership creditor, proceeding against estate of deceased partner.* When a creditor seeks to subject the estate of a deceased partner to the payment of an alleged partnership debt, he must show that it was contracted by the partnership during its existence; and it is not sufficient to prove a written acknowledgment by the survivor, the institution of an action at law against him, and the recovery of a judgment against his personal representative. *Ib.* 411.
26. *Rights of partnership creditors, on dissolution of partnership, insolvency and misconduct of surviving partner.*—Strictly speaking, partnership creditors have no lien upon the partnership assets for the payment of their debts, though they are entitled to priority of payment over individual creditors; yet, where the surviving partner becomes insolvent, and his individual creditors

CAHNOCERY—*Continued.*

- levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets. *Farley, Spear & Co. v. Moog*, 148.
27. *Specific performance of contract; want of mutuality as defense.* When the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time; the road having been completed within the specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable in damages if they failed to construct the road, comes too late after the completion of the work. *Wilks v. Ga. Pacific R. R. Co.*, 180.
  28. *Same; want of incorporation as defense.*—Since railroads may be built by private enterprise, without the aid of corporate powers, it is no objection to a specific performance of such contract, that the projectors of the road had not been incorporated when the contract was made. *Ib.* 180.
  29. *Same; bill by assignee.*—The bond being made payable to the projectors by name, "their associates and successors," and duly assigned by them to a corporation, by which the road was built as stipulated, that corporation may maintain a bill for the specific performance of the contract. *Ib.* 180.
  31. *Bill of review for error apparent; what may be considered.*—On application for a bill of review on the ground of error apparent, no question arising as to any gross mistake or omission in the preparation of the original cause, the court can only consider the facts ascertained, as shown by the pleadings, admission of facts, and facts asserted as such in the decree and opinion of the court, or necessarily implied in the decree rendered. *Banks v. Long*, 319.
  32. *Bill of review, on ground of new evidence.*—To sustain a bill of review on the ground of newly discovered evidence, it must appear that the additional evidence was not known at the time of the former hearing, and could not have been ascertained by the exercise of proper diligence; and the new evidence, with the other testimony already in, must entitle the complainant to a decree more beneficial to him than the decree already rendered. *Ib.* 319.
  33. *Resulting trust arising from payment of purchase-money.*—To establish a resulting trust in lands, in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must be shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase-money, if money was paid, or other thing of value which constituted the consideration, or that the credit (if credit was given) was extended to him. *Bibb v. Hunter*, 351.
  34. *Same; burden of proof; admissions of grantee.*—The presumption being that the conveyance speaks the truth, the *onus* is on the party who seeks to establish a resulting trust in the lands, to overcome this presumption by evidence full, clear and satisfactory; and the verbal admissions or declarations of the grantee, while admissible as evidence against him, are not sufficient, unless plain and consistent with themselves, or corroborated by circumstances. *Ib.* 351.
  35. *Same; testimony of complainant, as to transactions with deceased*



CHANCERY—*Continued.*

*grantee.*—When a conveyance is taken to the grantee for life, with remainder to certain grandchildren by name, and another grandchild files a bill to establish a resulting trust in his own favor, on account of moneys advanced by him to make the purchase, the complainant may testify to transactions between himself and the deceased grantee (Code, § 3058); but, the bill not being filed until after the death of the grantee, that fact must be considered in weighing such testimony, and renders more stringent the necessity for corroborating circumstances. *Ib.* 351.

36. *Resulting trust in part of lands purchased; variance.*—If the complainant's notes were given, at the time of the original transaction, for the deferred payments of purchase-money, while the cash payment was made by the grantee with his own funds, a resulting trust may be declared in a corresponding aliquot part of the land, although the notes were paid at maturity by the grantee himself; but this relief can not be granted, under a bill which alleges the payment of the entire purchase-money by the complainant, and claims a resulting trust in the entire tract of land. *Ib.* 351.
37. *Trust for married woman and children; what estate she takes, and when equity will not, at instance of creditors, enforce execution of trust, in her favor.*—When infant children, having obtained decrees against their guardian and his sureties on settlement of his accounts, transfer and assign such decrees to a trustee, upon trust so to proceed, in the enforcement of the decrees by execution, as to secure to them certain designated property free of expense, "and upon the further trust to purchase the remainder of the property sold under said executions, and to settle that part thereof held and owned by said M. [the guardian], and sold as his property, on his wife and children, in such proportions as said trustee may in his discretion consider fitting;" the wife of said M. does not take, under the deed of assignment, such an estate or interest in the property purchased and held by the trustee, as can be subjected in equity to the payment of debts contracted by her; nor will a court of equity, at the instance of her creditors, compel the trustee to execute a settlement in her favor. *Moses Bros. v. Micou*, 564.
38. *Charitable trusts; what are, and jurisdiction of equity over.*—A charitable trust, as known and recognized at common law, and sustained by courts of equity, was public in its nature, and the persons to be benefited by it were vague, uncertain, and indefinite, until designated as the beneficiaries for the time being; and where a common fund is created by voluntary contributions, its benefits being restricted to members of the association, it can not be considered a charitable trust, nor subject as such to be controlled by a court of equity. *Burke v. Roper*, 138.
39. *Voluntary charitable associations; jurisdiction of equity on ground of partnership.*—The jurisdiction of equity over such voluntary associations and their funds can not be sustained on the ground of partnership, since the members, whatever may be their relation or liability to third persons, are not partners *inter sese*; there is no mutual participation in profits or loss, no authority to bind or assign the common property, and no dissolution wrought by the death of a member. *Ib.* 138.
40. *Same; considered as trusts.*—The jurisdiction of courts of equity over such voluntary associations and their funds is maintained, independent of the statute of uses, or of any prerogative power, on the ground of the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies. *Ib.* 138.

## CHANCERY—Continued.

41. *Same ; jurisdiction to decree dissolution, and distribution of funds.* When the operations of such voluntary association have been discontinued, its objects and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the several contributors in proportion to the amount contributed or paid by them respectively. *Ib.* 138.
42. *Same.*—A new association being formed on the dissolution of the old, composed of some of the members with other persons, members of the same church, and made subject to such laws and restrictions as the church might prescribe ; while an unauthorized dismissal of some of the members, by the arbitrary act of the minister in charge, without a trial or hearing, might afford grounds for legal proceedings to compel their restoration, such nugatory act would not authorize a court of equity, at their instance, to decree a dissolution of the association, or a distribution of the common fund among the members. *Ib.* 138.
43. *Vendor's lien ; waiver of.*—When the vendor executes a conveyance to the purchaser, taking the note of a third person, indorsed by the purchaser, for the agreed price, or the deferred payments, the vendor's lien, as arising by implication of law, is presumptively waived. *Kyle v. Bellenger*, 516.
44. *Reservation of lien by contract.*—When lands are sold on a cash basis, part of the price being paid in cash, part in the notes of third persons indorsed by the purchaser, and his due-bill taken for a small balance ; an express stipulation in the conveyance, that the vendor "in no way waives the vendor's lien on said land by reason of said personal securities," does not show the reservation of a vendor's lien such as arises by implication of law, the liability of the purchaser on the indorsed note being only secondary, but creates a contract lien in the nature of an equitable mortgage, which may be enforced so soon as the note is due and unpaid, without waiting for a judgment and execution against the maker. *Ib.* 516.
45. *When mortgagee, or assignee, is not purchaser for valuable consideration.*—When a mortgage is given merely as security for a pre-existing debt, no new consideration entering into the transaction, the mortgagee is not entitled to protection against an outstanding equity of which he had no notice, as a purchaser for valuable consideration ; and if he transfers his interest as collateral security for an existing debt, without any new consideration, his assignee is not a purchaser for value. *Banks v. Long*, 319.
46. *Protection to purchaser for value without notice.*—A purchaser for value, without notice, is entitled to protection against the equity of a surety to have the property of his principal first applied in satisfaction of the common debt ; but, to make out such defense, the purchaser must not only state his purchase, and the *bona fide* payment of the consideration, with circumstantiality of detail, but must deny notice of the outstanding equity, and knowledge of any fact sufficient to put him on inquiry, down to the time of his payment of the purchase-money ; and this denial must be positive, and must be made whether notice is charged or not. *Gresham v. Ware*, 192.
47. *Purchase pendente lite ; substitution of trustee.*—A purchaser of property *pendente lite* takes it subject to the hazards of the pending litigation, and is bound by any decree afterwards rendered ; and this rule applies with special force where a new trustee is substituted by the voluntary act of the parties, without the sanction of the court, pending a suit to enforce the trust. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.

## CHANCERY—Continued.

48. *State-indorsed railroad bonds ; rights of purchasers.* *Spence v. M. & M. Railway Co.*, 576; *Morton & Bliss v. N. O. & S. Railroad Co.*, 590. See BILLS OF EXCHANGE, AND PROMISSORY NOTES.

## PLEADING AND PRACTICE.

49. *Amended answer and cross-bill; repugnancy with original.*—An amended answer and cross-bill, when inconsistent with and repugnant to the original, is demurrable; as where the original repudiates a payment, alleged to have been wrongfully made, and the amendment seeks to ratify and claim the benefit of it. *Williams, Deacon & Co. v. Jones*, 119.
50. *Amendment by adding or striking out parties, under statutory provision.*—The statute authorizing amendments in chancery, at any time before final decree, “by striking out or adding new parties” (Code, § 3790), is very liberal in its provisions, and confers a right which, in a proper case, is not matter of discretion with the chancellor; but it is not to be construed as authorizing, in every case, as matter of right, the introduction by amendment of new parties who, by purchase or voluntary assignment *pendente lite*, have acquired an interest in the subject-matter of the suit. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
51. *Creditors’ bill to foreclose deed of trust; parties coming in under decretal order of reference.*—By the settled practice of courts of equity, under a bill to enforce and foreclose a deed of trust for the benefit of numerous creditors, the court may adjust equities and priorities of the different classes of creditors, as represented by the parties then before the court; and those who afterwards come in under the decree and order of reference, and prove their claims, can not complain that this was done before they were in court as parties. *Ib.* 590.
52. *Same; cross-bill between bondholders.*—The original bill being filed by a judgment creditor of an insolvent railroad corporation, which had conveyed all of its property to trustees for the benefit of the holders of certain mortgage bonds, the validity of which was assailed and denied by the complainant; a cross-bill between the several bondholders, claiming and asserting antagonistic interests under the deed of trust, is proper and necessary to adjust and settle their conflicting liens and priorities. *Ib.* 590.
53. *Wife as party to bill against husband.*—When a married woman joins with her husband in a mortgage of lands, the legal title to which stands in his name, she is not a necessary party to a bill for foreclosure, even if she claims an equity in the lands on the ground that her funds were used in paying the purchase-money; and not being made a party, her rights would not be affected by the decree; yet she may be made a party, in order that she may be bound by the decree. *Flowers v. Baker*, 445.
54. *Non-joinder of sureties as parties.*—The tax-collector’s bond being made joint and several by statute (Code, §§ 2905, 3754), it is not necessary that all of the sureties should be joined as defendants in a bill which seeks to enforce, in the name of the county, a settlement of his accounts by a tax-collector. *Lott v. Mobile County*, 69.
55. *Multifariousness.*—The bill is not multifarious, because it joins as defendants some of the sureties on two bonds, given for successive terms, alleging that the tax-collector kept but one running account, in which collections were applied indiscriminately. (STONE, C. J., *dissenting.*) *Ib.* 69.
56. *Allegations of creditor’s bill; certainty and definiteness.*—In a creditor’s bill, seeking to set aside a conveyance by his debtor on the



CHANCERY—*Continued.*

- ground of fraud, the facts constituting the alleged fraud must be stated, and it is not sufficient to allege, in general terms, that the debtor has fraudulently transferred, or attempted to fraudulently transfer his property, with the intent and purpose to defraud complainant and his other creditors. *Jones v. Massey*, 370.
57. *Petition; when proper, and what relief may be had under.*—After the rendition of a final decree, and the adjournment of the term at which it was rendered, a petition can not be entertained asking relief which varies its terms, or which is inconsistent with the principles settled by it; though matters relating to the taking of the account, or otherwise pertaining to the execution of the decree, are properly presented by petition. *Marshall, Davis & Co. v. McPhillips*, 145.
  58. *When decree is final.*—Under a bill filed by creditors, asking the settlement of a deed of assignment for their benefit, the court having taken jurisdiction of the trust, and ordered a reference to the register to ascertain and report who were creditors, the amount of their debts, &c, directing him to make publication, and declaring all claims barred which were not presented within the time specified; a decree rendered at the next term, on pleadings and proof, after the confirmation of the register's report, declaring those whose claims were allowed to be the only creditors, allowing their claims for the amounts respectively specified, and directing the trustee to make ratable distribution among them, to report his action from time to time to the court, and to remain under its protection and direction in the execution of the trust and the decree, is a final decree, from which an appeal will lie. *Ib.* 145.
  59. *Waiver of demurrer and objections to amendable defects, by agreement for consent decree of compromise.*—A written agreement in a chancery cause, made and entered of record after demurrer filed, by which it is stipulated that the controversy should be compromised on certain specified terms, and should be submitted to the chancellor for decision "on the basis of this agreement," is a waiver of the demurrer, so far as consent can waive objections to the equity of the bill, and of all amendable defects in it; but the decree must conform to the terms of the agreement. *Winter v. City Council*, 481.
  60. *Consent decree against married woman.*—In the absence of fraud in its procurement, or other special cause shown, a consent decree is as binding on a married woman as on a person *sui juris*. *Ib.* 481.
  61. *Documents used before register; presumption in favor of chancellor's decision.*—When affidavits, or other documents, used before the register on a reference, are not set out in the record, this court can not make any presumption as to their contents, against the rulings of the register and the chancellor. *Ib.* 481.
  62. *Variance.*—When a bill seeks to enforce a vendor's lien on land, alleging that the note of a third person, indorsed by the purchaser, was taken as additional security for a part of the agreed price, without waiving the vendor's lien; and the evidence shows that a contract lien, in the nature of an equitable mortgage, was expressly reserved, the variance is fatal to relief, but the bill will be dismissed without prejudice. *Kyle v. Bellenger*, 516.
  63. *Same.*—If the complainant's notes were given, at the time of the original transaction, for the deferred payment of purchase-money, while the cash payment was made by the grantee with his own funds, a resulting trust may be declared in a corresponding aliquot part of the land, although the notes were paid at ma-

CHANCERY—*Continued.*

- turity by the grantee himself; but this relief can not be granted, under a bill which alleges the payment of the entire purchase-money by the complainant, and claims a resulting trust in the entire tract of land. *Bibb v. Hunter*, 352.
64. *Dismissal of bill without prejudice.*—When a bill asserts inconsistent and repugnant rights, and is dismissed on that account, the dismissal is properly made without prejudice. *Williams, Deacon & Co. v. Jones*, 119.
65. *Revision of register's findings on facts.*—As to conclusions of fact drawn by the register on a reference, all reasonable presumptions will be indulged in support of his rulings; and they will not be disturbed, unless they are based on wrong legal principles, or are clearly shown to be erroneous on the evidence. *Gresham v. Ware*, 192.
66. *Revision of chancellor's decision on facts.*—The settled rule of this court, in reviewing the chancellor's decision on facts, is not to reverse unless clearly convinced that he erred. *Gilmer v. Wallace*, 464; *Moog v. Farley*, 246.

## CHANGE OF VENUE.

1. *When application must be made.*—An application for a change of venue, in a criminal case, is required to be made "as early as practicable before the trial" (Code, § 4911); and it comes too late when made after several postponements of the case, after an application for a continuance has been overruled, after the witnesses have been sworn and put under the rule, and after the solicitor has expressed himself satisfied with the jury. *Shackelford v. The State*, 26.

## CHARGE OF COURT TO JURY.

1. *Abstract charge.*—A charge asked, based on facts which there is no evidence tending to establish, is properly refused, because abstract. *Westbrook v. Fulton*, 510.
2. *Ambiguous charge.*—When a charge asked and refused is ambiguous, or susceptible of two constructions, that construction will be adopted which is least favorable to the party asking it. *Carter v. Chambers*, 223.
3. *Construction of charge in connection with evidence.*—Charges to the jury must be construed in connection with the evidence; and if a charge, when so construed, is free from error, though it asserts a rule which, when applied to a different state of proof, would not be correct, it is no ground of reversal. *Ib.* 223.
4. *Charge on oral testimony; when invading province of jury.*—The credibility of oral testimony being a question for the decision of the jury, a charge is erroneous which assumes, or states as fact, any material matter which depends on the sufficiency of oral testimony for its establishment; yet, where the record affirmatively shows that certain facts were admitted, or were clearly proved and not disputed, they may be stated without hypothesis. *Ib.* 223.
5. *Charge as to witness swearing falsely; not authorized by conflict in testimony.*—A mere conflict in the testimony—as where one witness testifies that he heard one of the parties make a certain declaration, while others, also present at the time, testify that they did not hear it—does not authorize a charge to the jury as to the effect to be given to the testimony of a witness who has sworn falsely in one particular. *Ib.* 223.
6. *Charge objectionable for generality, confusing, or misleading.*—A charge which, as applied to the particular case, is correct, though asserting a general principle too broadly, or which has a tenden-

CHARGE OF COURT TO JURY—*Continued.*

- cy to confuse or mislead the jury, may properly be refused; but, if given, it is not a reversible error. *Ib.* 223.
7. *General charge in favor of defendant; when authorized or proper.*—A general charge in favor of the defendant should never be given, except when the plaintiff has failed to make out a *prima facie* case, or where, on the admitted facts, he is not entitled to recover; and where there is any conflict, however slight, in the testimony as to any fact material to the defense, such charge is properly refused. *Hall v. Posey*, 84.
  8. *Charge construed; explanatory charge.*—A charge to the jury in these words: "If the jury believe that the saw was out of order, and more dangerous than a sharp saw by reason of not being properly sharpened, and that the dullness of the saw caused the injury here complained of, and that this was unknown to the plaintiff, and that it could have been known to the defendant but for the want of reasonable care and diligence in keeping the saw in the proper condition, then their verdict ought to be for the plaintiff,"—does not invade the province of the jury, by assuming as fact matters dependent entirely on oral testimony; nor in failing to limit their conclusions or belief to the matters established by the evidence, as in the usual form, "If the jury believe from the evidence;" and if injury was apprehended from its form, an explanatory charge should have been asked. *Ib.* 84.
  9. *Charge misleading, or invading province of jury.*—When the testimony is indeterminate, circumstantial, or such that inferences of fact are necessary to complete its probative sufficiency, the rule imperatively requires that, in charging the jury, nothing shall fall from the lips of the presiding judge which tends in the slightest degree to invade their peculiar province in weighing and sifting the evidence; though the court may give proper instructions as to the burden of proof, legal presumptions, or anything else that is merely matter of law. *Westbrook v. Fulton*, 510.
  10. *Charge misleading jury.*—A charge which calls on the jury to institute a comparison between the probative force of the testimony of different witnesses, equally credible, and having equal means of knowledge, is calculated to confuse and mislead them, and should never be given; but the giving of such a charge is not a reversible error. *Ala. Fertilizer Co. v. Reynolds & Lee*, 497.
  11. *Charges as to burden of proof.*—It is the duty of the court to determine, and to instruct the jury if necessary, on whom rests the burden of proof as to any material issue; and a charge which submits that question to the jury, or which places the burden of proof on the wrong party, is a reversible error. *Ib.* 497.
  12. *Charge submitting legal question to jury.*—It is the province and duty of the court to construe the record showing the prosecution and its termination, and its legal effect should not be submitted to the determination of the jury. *Steed v. Knowles*, 446.
  13. *Charge on part of evidence.*—When witnesses are examined by both parties, and testify to material facts, all the facts and circumstances should be submitted to the jury; and a charge which selects one witness, gives his testimony undue prominence, and indicates to the jury that they may look to it alone, is properly refused. *Railroad Co. v. Deaver*, 216.
  14. *Charge asked and refused, but not shown to have been asked in writing.* Charges asked and refused must be shown to have been asked in writing, else this court will presume that they were not in writing, and were refused on that account. *Harrison v. The State*, 29.
  15. *Charge as to legal maxim favoring escape of innocent.*—A charge asked, in a criminal case, instructing the jury, "that it is a maxim



CHARGE OF COURT TO JURY—*Continued.*

- of the law, that it is better for ten guilty men to escape than that one innocent man should suffer," tends to mislead them, and is properly refused. *Garlick v. The State*, 265.
16. *Charge ignoring proof of time and place.*—A charge is misleading, if not erroneous, which authorizes the jury to find a verdict of guilty without any consideration of the evidence as to the venue, or as to the time when the offense was committed. *Shackleford v. The State*, 26.
  17. *Charge as to inference of malice from character of weapon.*—A charge which instructs the jury, "if they believe from the character of the weapon used that the shooting was with malice, then the defendant would be guilty of murder," authorizing the inference of malice from the character of the weapon used, without regard to the other circumstances in evidence, is erroneous. *Jordan v. The State*, 9.
  18. *Charge as to reasonable doubt.*—A charge to the jury, in a criminal case, in these words: "In making up their verdict, and after having considered all the evidence, if the jury entertain a reasonable doubt as to the truth of any part of the evidence, they should give the defendant the benefit of that doubt, and discard all the evidence adverse to him, as to which they entertain such reasonable doubt, and give consideration to all that portion which is favorable to him, and as to which they have reasonable doubt, so that he may obtain the full benefit of every reasonable doubt; and if, after treating the entire evidence in this way, they entertain a reasonable doubt as to any material element of the offense, they should give the defendant the benefit of that doubt, and acquit him,"—"is too complicated to be given in charge to a jury, and asserts one proposition which is not sound. *Carney v. The State*, 14.
  19. *Same.*—A charge asked, which claims an acquittal "if the jury have a doubt about the defendant's guilt," is properly refused: only a reasonable doubt justifies an acquittal. *Jones v. The State*, 23.
  20. *Charge as to "legal excuse" for shooting.*—What would be a "legal excuse" for the act of shooting, is a question of technical, legal learning, which the court should define, and should not leave to the decision of the jury; and a charge which leaves it to the jury is properly refused. *Ib.* 23.
  21. *Charge as to self-defense.*—A charge asked, invoking the doctrine of self-defense, but ignoring the question of provocation by the defendant, which there is evidence tending to establish, and also ignoring the question whether there were any other means of escape, is properly refused. *Ib.* 23.
  22. *Same.*—A charge asked, which bases the defendant's right to an acquittal on his reasonable apprehension of an assault, ignoring a real or apparent danger to life or limb, and also the question of retreat, is properly refused. *Hall v. The State*, 32.

CHARITIES. See CHANCERY, 38-42.

## CODE OF ALABAMA.

1. § 403. Official bond of tax-collector. *Lott v. Mobile County*, 69.
2. § 460. Deed of probate judge for lands sold for taxes. *Bolling v. Smith*, 535.
3. § 464. Limitation of action for recovery of lands sold for taxes. *Hughes v. Anderson*, 209; *Bolling v. Smith*, 535.
4. § 768. Appointment of special constable. *Floyd v. The State*, 39.
5. § 906. Official bond of county superintendent. *Reed v. Summers*, 522.

## CODE—Continued.

6. § 988. Certificate of purchase of sixteenth-section lands. *Watson v. Prestwood & Fletcher*, 416.
7. §§ 1586-7. Lawful fences; trespassing cattle. *Wilhite v. Speakman*, 400.
8. §§ 1692-3. Action by county on bond of bridge contractor. *James v. Conecuh County*, 304.
9. §§ 1699-1712. Statutory duties and liabilities of railroad companies. *Railroad Co. v. Deaver*, 216; *Railroad Co. v. Fullerton*, 298.
10. § 1785. Publication of municipal ordinances. *Pitts v. Opelika*, 527.
11. § 2121. Statute of frauds; promise to answer for debt of another person. *Wright v. The State*, 262.
12. § 2129. Express trust in lands. *Bibb v. Hunter*, 351.
13. § 2449. Sale of decedent's lands for equitable division. *Roulston v. Washington*, 529; *Bolling v. Smith*, 535.
14. § 2717. Removal of husband as wife's trustee. *Kraft v. Lohman*, 323.
15. § 2728. Earnings of wife secured to her separate use. *Kraft v. Lohman*, 323.
16. § 2820. Exemption of homestead. *Hines v. Duncan*, 112.
17. § 2822. Conveyance of homestead. *Hines v. Duncan*, 112; *Strauss & Steinhardt v. Harrison*, 324.
18. § 2843. Lease of homestead. *Hines v. Duncan*, 112.
19. §§ 2878-9. Redemption of real estate sold under execution. *Richardson v. Dunn*, 167.
20. § 2902. Action by State; instructions of governor to attorney-general. *Wolffe v. The State*, 201.
21. § 2905. Joint and several obligations. *Lott v. Mobile County*, 69.
22. §§ 2951-54. Suggestion of adverse possession and erection of permanent improvements. *Collart v. Moore*, 361.
23. § 3045. Proof of foreign statute. *Edmunds v. The State*, 48.
24. § 3058. Proof of transactions with decedent, by testimony of party. *Bibb v. Hunter*, 351.
25. § 3112. Nonsuit with bill of exceptions. *Levinshon v. Edwards*, 293.
26. §§ 3121-22. Appeals from justice's court. *Lehman, Durr & Co. v. Hudnon*, 532.
27. § 3146. Re-taxation of costs. *Forcheimer & Co. v. Kaver*, 285.
28. § 3397. Summary proceeding against defaulting county superintendent. *Reed v. Summers*, 522.
29. §§ 3440-61. Statutory lien of contractors and material-men. *Bedsole v. Peters*, 133; *Lane & Bodley Co. v. Jones*, 156.
30. § 3467. Landlord's statutory lien. *Hardin v. Pulley*, 381.
31. § 3472. Attachment at suit of landlord. *Knowles v. Steed*, 427.
32. §§ 3537-40. Arbitration of pending suit. *Dudley v. Farris & McCurdy*, 187.
33. § 3547. Judgment on award. *Dudley v. Farris & McCurdy*, 187.
34. § 3693. Appeals from justices. *Knowles v. Steed*, 427.
35. § 3704. Unlawful detainer. *Murphree v. Bishop*, 404.
36. § 3754. Suit against joint obligors. *Lott v. Mobile County*, 69.
37. § 3790. Amendments in chancery. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
38. § 3886. Bill in equity by creditor without lien. *Jones v. Massey*, 370.
39. § 4109. Carrying concealed weapons. *Smith v. The State*, 257.
40. § 4130. Aiding prisoners to escape. *Hurst & Hill v. The State*, 55.
41. § 4188. Seduction. *Carney v. The State*, 14.
42. § 4203. Abusive language near dwelling-house. *Weaver v. The State*, 279.

## CODE—Continued.

- 43. § 4204. Retailing liquors without license. *Campbell v. The State*, 271.
- 44. § 4325. Enticing away servant. *Turpley v. The State*, 271.
- 45. § 4354. Sale or removal of mortgaged property. *Steed v. Knowles*, 446.
- 46. § 4360. Statutory trespass on lands. *McCord v. The State*, 269.
- 47. § 4449. Repeal of statute pending prosecution. *Barton v. Gadsden*, 495.
- 48. § 4644. Limitation of criminal prosecution. *Martin v. The State*, 267.
- 49. § 4813. Indictment for perjury. *Davis v. The State*, 20.
- 50. § 4819. Preferring new indictment. *Smith v. The State*, 21.
- 51. § 4852. Bail. *Rogers v. The State*, 59.
- 52. § 4862. New undertaking of bail. *State v. Posey*, 45.
- 53. §§ 4867-8. *Scire facius* against bail. *State v. Posey*, 45.
- 54. § 4883. Challenge of juror. *Harrison v. The State*, 29.
- 55. § 4911. Change of venue. *Shackleford v. The State*, 26.

## COLLATERAL SECURITY.

1. *Transfer of negotiable paper as collateral security.*—When negotiable coupon bonds, or other commercial instruments, are transferred as collateral security, for the repayment of money advanced on the faith of them, the holder should be permitted, on foreclosure of a deed of trust given to secure them and other bonds issued at the same time, to prove for the entire amount of the collaterals so held by him; but he can only recover the amount of his original debt, with lawful interest thereon. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
2. *Same; allowance of counsel fees.*—Counsel fees incurred by the holder of bonds so transferred, in the suit to foreclose the deed of trust, not being a part of the debt for which the bonds were transferred as collateral security, can not be allowed as part of the amount for which they are entitled to prove, over and above the amount of their debt. *Ib.* 590.
3. *When mortgagee, or his assignee, is not purchaser for valuable consideration.*—When a mortgage is given merely as security for a pre-existing debt, no new consideration entering into the transaction, the mortgagee is not entitled to protection against an outstanding equity of which he had no notice, as a purchaser for valuable consideration; and if he transfers his interest as collateral security for an existing debt, without any new consideration, his assignee is not a purchaser for value. *Banks v. Long*, 319.
4. *Election of remedies in case of wrongful payment.*—When a party has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety; and he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment. But, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor; and the holder of a bill of exchange, to whom it has been transferred as collateral security by the payee, does not forfeit his right of action against the other parties, by an unsuccessful suit against one. *Williams, Deacon & Co. v. Jones*, 119.

## COMMON CARRIER.

1. *Liability for loss or damage.*—A common carrier, receiving goods for transportation, is an insurer, except against the act of God or



COMMON CARRIER—*Continued.*

- the public enemy, or the wrong or negligence of the party complaining; and is liable for the accidental loss of the goods by fire. *L. & N. Railroad Co. v. McGuire & Co.*, 395.
2. *Same; continues how long.*—In the absence of statutory regulations, the liability of a common carrier continues, after the goods have reached their destination, until the consignee has had a reasonable time to remove them; and after that time he is liable only as a warehouseman, or bailee for hire. *Ib.* 395.
  3. *Same; after demand and failure to deliver.*—When a carrier fails, without good excuse, to deliver the goods on demand after they have reached their destination, he continues to hold them as carrier at his own risk and peril. *Ib.* 395.
  4. *Same; lien for charges, as excuse for failure to deliver.*—If the failure to deliver the goods, on demand of the consignee, is not placed on the ground of a lien for charges, or the non-payment thereof, the carrier can not set up such lien or non-payment in defense of a subsequent action for the loss of the goods. *Ib.* 395.

## CONFEDERATE CURRENCY.

1. *As consideration for purchase of railroad bonds.*—Railroad bonds, issued in 1862–63, and sold for Confederate currency, being enforced as an equitable mortgage against subsequent purchasers of the railroad franchise and property, the plaintiff's recovery is limited to "the purchasing value of the currency thus paid, at the time of the purchase, with interest on that value." *Spence v. M. & M. Railway Co.*, 576.

## CONSTABLE.

1. *Appointment of minor as special constable.*—A minor is not eligible to the office of constable; but, when specially appointed by a justice of the peace to execute a particular process (Code, § 768), he is an officer *de facto*. *Floyd v. The State*, 39.

## CONSTITUTIONAL LAW.

1. *Construction of statute in favor of its constitutionality.*—When a statute is fairly susceptible of two constructions, one of which will uphold, and the other defeat its constitutionality, the former construction will be adopted, even though it be the less natural. *Quartlebaum v. The State*, 1.
2. *Revenue license-tax on sewing-machine companies; construction and constitutionality of.*—The statutory provision imposing a license-tax of \$25.00 on "every sewing-machine company selling sewing-machines, either themselves or by their agents, and all persons who engage in the business of selling sewing-machines" (Sess. Acts 1884–5, p. 17, §§ 8, 14, sub-d. 20), does not discriminate between companies and natural persons, but authorizes a conviction against either, on proof of single sale, made under circumstances which show that it was done in the prosecution of the business; nor does the further provision contained in said subsection, which exempts from the payment of said tax "merchants engaged in a general business, keeping sewing-machines as a part of their stock in trade," make any unconstitutional discrimination. *Ib.* 1.
3. *Statute creating and punishing offense of enticing away servant.*—At common law, an unauthorized interference by a third person with the contractual relations existing between master and servant, was an actionable tort; and the statute making it a misdemeanor, under certain circumstances, punishable by fine (Code, §§ 4325–27; Sess. Acts 1880–81, p. 42), is not an indirect attempt

CONSTITUTIONAL LAW—*Continued.*

to punish the violation of a contract by fine and imprisonment, nor otherwise objectionable on constitutional grounds. *Tarpley v. The State*, 271.

4. *Local prohibitory law in charter of manufacturing company.*—The 4th section of the act incorporating the Tallassee Manufacturing Company Number One, approved January 29th, 1852, which makes it a misdemeanor for any person to sell intoxicating liquors. "by retail or otherwise, within four miles of the factories of said corporation," became operative as soon as the factories of the corporation were erected; and it still continues of force as a valid legislative enactment, though all the property of the corporation has been sold under a decree in chancery, and the purchasers are carrying on the same business there under a new corporate name. *Ashurst v. The State*, 276.
5. *Tax on appeal for benefit of Supreme Court Library.*—The statute imposing a tax-fee of six dollars in each case decided on appeal by this court, for the benefit of the library (Sess. Acts 1882-83, p. 149), is a legitimate exercise of the taxing power, and is not violative of any constitutional provision. *Swann & Billups v. Kidd*, 431.
6. *Constitutional protection to franchises granted by corporations.*—A franchise granted by a municipal corporation, on valuable consideration, by an ordinance in the nature of a contract, if legal, is within the protection of the constitutional provision against laws impairing the obligation of contracts; and it can neither be taken away by the repeal of the ordinance, nor impaired by a subsequent grant of such franchise to another. *In re Street Railway Companies*, 465.
7. *Grant of exclusive franchise, in perpetuity, to street railway company.* Neither the charter of the city of Birmingham, nor the general statutes, confer on that corporation the power to grant, by ordinance in the nature of a contract, the exclusive franchise in perpetuity of running a street railway through certain designated street and avenues of the city; and if such power were granted by its charter, or by any public statute, it would be violative of the constitutional provision (Art. I, § 23) against the passage of any law "making any irrevocable grant of special privileges or immunities. *Ib.* 465.

## CONTRACTS.

1. *Intention of parties to contract; how ascertained or proved.*—In the construction of a written contract, the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction, and the surrounding circumstances; and they can not be allowed to testify as to their understanding and intention. *Kyle v. Bellenger*, 516.
2. *Construction of instrument partly written and partly printed.*—In the construction of an instrument partly written and partly printed, greater weight is to be attached to the written than to the printed portions; but the instrument must be examined in its entirety, apparent discrepancies reconciled, if possible, and some operation given to each clause. *Bolman v. Lohman*, 63.
3. *Implied contract that passengers may alight at platform not owned by railroad company.*—If the trains of the defendant railroad company were accustomed to stop at the platform at which the plaintiff desired to alight, although it was neither constructed nor owned by the company, an implied contract that passengers might stop there may be raised. *L. & N. Railroad Co. v. Johnston*, 436.
4. *Sale of manufactured article; when property passes to purchaser.*

CONTRACTS—*Continued.*

Under a contract for the sale and purchase of a manufactured article, the property does not pass to the purchaser by his order to the manufacturer and its acceptance: there must be the selection and appropriation of one particular article, and facts showing an intention to pass the title or property to the purchaser. *Jones & Co. v. Brewer*, 545.

5. *Same*.—When the manufacturer, on receipt of the order, selects a particular article, and forwards it by railroad, as directed, taking the bill of lading in his own name, attaching it to the draft for the price, and indorsing it to the freight agent at the place of destination, with instructions to "deliver to bearer;" these facts show an intention to retain the title until payment, and a loss by accidental fire at the railroad depot falls on the seller. *Ib.* 545.

## CORPORATIONS.

1. *Corporation for manufacturing machinery; can not act as agent to sell for another*.—A private corporation, organized, as declared in its charter, for the purpose of manufacturing and repairing machinery, and prohibited from contracting any debt without the written consent of its board of directors, has no power to act as the agent of another manufacturer in making sales of his machinery. *Westinghouse Machine Co. v. Wilkinson & Cole*, 312.
2. *Same; promissory note of purchaser*.—The corporation having no power to act as such agent in making sales, a promissory note taken by it from a purchaser, for the agreed price, payable to itself, is void; and the manufacturer can not maintain an action on it, either against the maker, or against the corporation as indorser. *Ib.* 312.
3. *Purchasers from corporation*.—Persons dealing with a corporation are required, at their peril, to inform themselves of the fact that it has a legal existence, and of the extent of the powers conferred by its charter; and they are chargeable with notice of every fact which would be disclosed by the act of its incorporation, or other acts therein referred to. *Spence v. M. & M. Railway Co.*, 576.
4. *Railroad corporation; power to acquire mineral lands*.—A railroad corporation can not, without an express grant of power, acquire or recover mineral interests in lands, since such property is neither necessary nor proper for carrying out the purposes of the corporation. *Wilks v. Geo. Pacific Railroad Co.*, 180.
5. *Estoppel by contract with corporation*.—If a party who contracts with a corporation thereby estops himself, when sued on the contract, from denying the power of the corporation to make it, as to which the decided cases are conflicting, the principle does not apply when a corporation seeks to enforce a contract as assignee of one of the original parties. *Ib.* 180.
6. *Power to enforce executory contract*.—A corporation can not, without an express grant of power, sue on an executory contract, and recover an interest in lands, when it does not appear that such land or interest is necessary for carrying into effect some power or purpose for which the corporation was created. *Ib.* 180.
7. *Deed of railroad corporation, executed by agent*.—Held, re-affirming *Standifer v. Swann & Billups* (78 Ala. 88), that a conveyance of lands which belonged to the Alabama & Chattanooga Railroad Company, executed by J. C. Stanton as general superintendent and attorney in fact, without written authority from the board of directors, or other governing body of that corporation, passed no title or estate of which a court of law could take cognizance; that if the corporation be held to have ratified the act of such agent in making the sale and conveyance, by its knowledge



CORPORATIONS—*Continued.*

of the facts and its failure to dissent, such ratification could only operate as an equitable estoppel, which is not cognizable at law. *Ware v. Swann & Billups*, 330.

8. *Municipal corporations; powers of.*—Municipal corporations can only exercise such powers as are expressly granted in their charter, or such as may be necessary and proper to carry the express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created; and any reasonable doubt as to the existence of a power claimed to be conferred by the charter, will be resolved against the corporation. *In re Street Railway Companies*, 465.
9. *Publication of municipal ordinances.*—The statutory provision requiring the ordinances of municipal corporations to be published ten days before they become operative (Code, § 1785), applies only to those corporations which are organized under the general law of which that provision is a part, and not to municipalities created by special statute, or legislative act.—*Pitts v. District of Opelika*, 527.
10. *Same.*—When the special statute creating a municipal corporation does not prescribe the length of time its ordinances shall be promulgated before they become operative, it is only necessary that there shall be a substantial compliance with the constitutional provision, that no person "shall be punished but by virtue of a law established and promulgated prior to the offense" (Art. I, § 8); which only requires that the promulgation shall be reasonably sufficient to accomplish the humane and just purpose for which it was enacted, as determined by the particular circumstances of each case. *Ib.* 527.
11. *Same.*—In this case, the corporation called the "District of Opelika" being created by special statute (Sess. Acts 1882-83, p. 485), which does not prescribe the length of time its ordinances shall be promulgated before they become operative, this court can not affirm, as matter of law, that an ordinance is not of force seven days after its enactment. *Ib.* 527.
12. *Municipal ordinance construed, as to sentence to fine and hard labor.* The municipal ordinance of the city of Montgomery, providing that any person convicted of a violation of any by-law or ordinance of the city "may be punished by fine or imprisonment, or by fine and imprisonment, or by hard labor upon the streets or public works of the city," does not authorize the imposition of a money fine and a sentence to hard labor for one and the same offense; though hard labor may, under the provisions of another ordinance, be imposed on non-payment of the fine. *Ex parte City Council of Montgomery*, 275.
13. *Municipal ordinance prohibiting sale of spirituous liquors, repealed by subsequent ordinance prohibiting sale without license.*—A municipal ordinance prohibiting the sale of spirituous liquors under a penalty, and a subsequent ordinance prohibiting their sale without a license, the price of which is prescribed, being inconsistent and repugnant, the former is repealed by the latter. *Barton v. Gadsden*, 495.
14. *Subscription to railroad by municipal corporation; levy of tax to pay interest on bonds.*—The power being granted to the corporate authorities of the city of Montgomery, by special statute, "to levy such taxes as may be necessary, upon the real and personal property in said city," to pay the interest on the city's subscription to the capital stock of the South and North Alabama Railroad Company, a levy on real property only was not void, the failure

CORPORATIONS—*Continued.*

to include personal property also being a mere irregularity; and the action of the authorities being in its nature legislative and governmental, rather than corporate, the *onus* is on a party assailing it to show that a different rate of taxation was necessary. *Winter v. City Council of Montgomery*, 481.

15. *Action against municipal corporation, for water supplied for sanitary purposes; contract ultra vires.*—The defendant in this case, a municipal corporation, having power under its charter to contract with plaintiff for a supply of water to be used in flushing sewers and extinguishing fires, an action lies to recover the agreed price of the water supplied and used in any one year, without regard to the power of the corporate authorities to enter into a valid contract for water for a term of twenty years or more. *City Council v. Water-Works Co.*, 233.
16. *Same; set-off or recoupment of damages on account of deficiency in quantity or quality of water.*—In such action against the corporation, the defendant can not be allowed to set off or recoup damages sustained by private persons, citizens and property owners, on account of property destroyed by fires by reason of the insufficiency of the water supplied by the plaintiff to extinguish fires; and if the defendant could, in any case, recoup damages on account of the defective quality of the water supplied, the question is not properly raised by the pleadings. *Ib.* 233.
17. *Same; evidence of custom in other cities, as to use of water.*—Evidence of an alleged custom in other cities having water-works, to use for sanitary purposes, flushing sewers, &c., water drawn through fire-plugs, is not competent or admissible for the defendant, in the absence of evidence as to the terms of the contracts under which the water was supplied and used in those cities. *Ib.* 233.

## COSTS.

1. *Fees of witnesses summoned but not examined; re-taxation of costs.* The fees of witnesses summoned by the successful party, but not examined by him, can not be taxed as a part of the cost in his favor, unless he shows to the court, by affidavit or otherwise, that there was a real or apprehended necessity for them; and when improperly included, the unsuccessful party may have the costs re-taxed under the statute (Code, § 3146), which is but a substantial affirmation of the pre-existing rule. *Forcheimer & Co. v. Kaver*, 285.

## COUNTY.

1. *Action by, on bond of bridge contractor.*—When a bridge has been erected under contract with the county commissioners, and bond taken from the builder conditioned to keep it in good repair for five years (Code, §§ 1692–93), that court may notify and require the builder to repair it, and, in the event of his refusal or neglect to do so, maintain an action on the bond, in the name of the county, without previous information or complaint by a freeholder of the county. *James v. Conecuh County*, 304.
2. *Bequest to county, in trust for preservation of private burial-place.* Neither the county as a corporation, nor the court of county commissioners, has power to take a bequest in perpetuity, in trust to lend or invest the money, and to appropriate the annual interest to the repair and preservation of the private burial-ground of the testatrix and her family. *Holifield v. Robinson*, 419.

## CRIMINAL LAW.

## ABUSIVE OR INSULTING LANGUAGE.

1. *Sufficiency of indictment*.—In an indictment for using abusive, insulting or obscene language, in or near a dwelling-house, or in the presence of women (Code, § 4203; Sess. Acts 1880–81, p. 30), it is sufficient to pursue the language of the statute, and is not necessary to specify the words used. *Weaver v. The State*, 279.
2. *Ownership of house; averment and proof of*.—When a widow marries again, and removes with her husband from her former residence, leaving her children by the first marriage in possession, the house may be described in an indictment as their dwelling-house. *Ib.* 279.
3. *What words constitute offense*.—Where the defendant, whose wife had left him, went to the house where her children by a former marriage lived, searching for her, and, on leaving, was told by one of them not to come there again; to which he replied, "*I'll go where I dam please, and it don't make a dam bit of difference where it is;*" held, that these words would support a prosecution under the statute. *Ib.* 279.

## ARREST.

4. *Authority of arresting officer*.—If the arrested person, being brought by the officer into the presence of the magistrate, attempts to escape before the magistrate has taken any step, or made any order changing his legal status, he may be pursued and recaptured by the arresting officer without any new process. *Floyd v. The State*, 39.

## ARSON.

5. *Averment and proof of ownership of house*.—In an indictment for arson, or attempted arson, the ownership of the building may be charged to be in A or B disjunctively (Code, § 4798); and if the evidence shows that it belonged to A, B and C jointly (Sess. Acts 1878–9, p. 46), the variance is immaterial. *Brown v. The State*, 51.
6. *To what defendant may testify as witness*.—Defendant, testifying as a witness for himself, can not be permitted to testify that he went into the basement of a building, where he was caught setting fire to some shingles, not for the purpose of setting fire to the building, but for the purpose of getting some whiskey. *Ib.* 51.

## ASSAULTS; ASSAULT AND BATTERY.

7. *Conduct of prosecutor prior to assault; admissibility as evidence*. The difficulty between the defendant and the prosecutor, originating in a dispute about the latter's refusal to sell ice for a sick person, on request of a youth who was the defendant's cousin, having taken place in the afternoon; and it being shown that the prosecutor went, during the morning of that day, to the store of the defendant's father, to explain or talk about the matter; the fact that he was then angry or agitated, or his manner objectionable, is too far removed from the subsequent assault and battery to form a part of the *res gestæ*, and is not competent evidence for the defendant for any purpose. *Henry v. The State*, 42.
8. *Variance in character of weapon used*.—Under an indictment which charges an assault with a razor, a conviction may be had on proof of an assault with a pocket-knife; the two instruments being of the same kind, and the character of the wounds inflicted being sub-



CRIMINAL LAW—*Continued.*

stantially the same, the variance is immaterial. *Hull v. The State*, 32.

9. *Conviction of less offense than charged.*—Under an indictment for an assault with intent to murder, a conviction may be had of a simple assault, or an assault and battery; consequently, a charge which claims an acquittal, because the evidence fails to establish the felony, is properly refused. *Jones v. The State*, 23.
10. *Self-defense.*—When two persons meet together, mutually use insulting words, and then fight willingly, or by mutual consent, it is immaterial which commenced the quarrel, and neither can set up the plea of self-defense; nor can he who provoked the quarrel set up that defense, being regarded as the aggressor, although he afterwards fought unwillingly; but he who is not the aggressor, merely using abusive words in reply to such words, and not fighting willingly, may protect himself from assault and injury, by opposing force with force so far as may be necessary. *Howell v. The State*, 283; also, *Jones v. The State*, 23; *Hull v. The State*, 32; *Henry v. The State*, 42.

## BAIL.

11. *Nature of proceeding; waiver of trial by jury.*—In *scire facias* against bail on a forfeited recognizance, which is a civil proceeding, the issue presented is required to be decided by the court (Code, §§ 4867-8); and if any issue can arise which would properly be determined by a jury, the failure to demand it is a waiver of the right. *The State v. Posey*, 45.
12. *Discharge of sureties by order for new recognizance.*—When the principal defendant is required by the court to enter into a new undertaking of bail, because of the insufficiency of the first, and is ordered into custody for his failure to do so (Code, § 4862), the sureties are discharged for any future default. *Ib.* 45.
13. *Discharge of bail, by discontinuance of prosecution.*—Where a person is bound over to appear at the next term of the Circuit Court, and from term to term thereafter until discharged by law (Code, § 4862), to answer for an offense with which he is charged on preliminary examination before a magistrate; if no indictment is found against him at that term of the court, no forfeiture taken, and the case not continued for further investigation, the prosecution is discontinued, and the sureties on the recognizance are discharged. *Rogers v. The State*, 59.

## CARRYING CONCEALED WEAPONS.

14. *Former acquittal, or conviction; continuous offense.*—Carrying a weapon concealed about the person (Code, § 4109), is necessarily an act continuous in its nature; and where it appears that the defendant, while visiting a neighboring plantation, and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he can not be again prosecuted on the testimony of the persons who saw him at the other houses. *Smith v. The State*, 267.

## ENTICING SERVANT OR APPRENTICE.

15. *Constituents of offense.*—When the contract of hiring is within the terms of the statute, and has not expired, it is as much a violation of the statute to hire the servant or laborer *after* as *before* he has abandoned the service of the master; but, *it seems*, know-

CRIMINAL LAW—*Continued.*

ledge by the defendant of the existence of the contract is a necessary element of the offense. *Tarpley v. The State*, 271.

16. *Constitutionality of statute creating and punishing offense.*—At common law, an unauthorized interference by a third person with the contractual relations existing between master and servant, was an actionable tort; and the statute making it a misdemeanor, under certain circumstances, punishable by fine (Code, §§ 4325–27; Sess. Acts 1880–81, p. 42), is not an indirect attempt to punish the violation of a contract by fine and imprisonment, nor otherwise objectionable on constitutional grounds. *Ib.* 271.

## ESCAPE.

17. *Assisting prisoner to escape from jail; constituents of offense.*—To authorize a conviction for aiding a prisoner to escape from jail (Code, § 4130), it is not necessary that the escape be effected or attempted by the prisoner; nor is it necessary that there shall be the special intent to liberate any particular prisoner, though a general intent to liberate must exist, and must be found by the jury; nor can the offense be consummated against the known consent of the prisoner. *Hurst & Hill v. The State*, 55.
18. *Same; sufficiency of indictment.*—In an indictment under this statute (Code, § 4130), a count which avers that the defendants “did assist one G., who was lawfully confined in the county jail of said county, under a charge of murder, to escape from said jail,” or, “did, with the intent to facilitate the escape of said G. from said jail, break or blow a hole in the wall of said jail, by placing dynamite in said wall, and by igniting said dynamite;” or, “did break the wall of said county jail, to assist said G. to escape from said jail;” or, “did, with and by the use of dynamite, break a rock which composed a part of the wall of said county jail, to assist said G. to escape from said jail,”—is each fatally defective in describing the offense. *Ib.* 55.
19. *Officer de facto.*—An officer *de facto*, executing process placed in his hands, is entitled to the same protection that the law gives to an officer *de jure*; and a person who is indicted for resisting him, or escaping from him, can not be heard to question his appointment. *Floyd v. The State*, 39.

## EVIDENCE.

20. *To what defendant may testify as witness.*—A defendant in a criminal case, testifying as a witness for himself, can not be permitted to testify as to his own uncommunicated motives or intentions; as, that he went into the basement of a building, where he was caught setting fire to some shingles, not for the purpose of setting fire to the building, but for the purpose of getting some whiskey. *Brown v. The State*, 51.
21. *Cross-examination of defendant, testifying as witness for himself.* When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness for himself, he can not be cross-examined, against his objection, as to former indictments against him for other offenses, which are not pertinent to the issue to be tried. *Smith v. The State*, 21.
22. *Witness testifying to his examination before grand jury.*—There is no error shown in allowing the prosecutor to testify to the fact that he was examined as a witness before the grand jury, since such evidence may sometimes be material, or it may have been introduced as merely preliminary to something else. *Allen v. The State*, 34.

## CRIMINAL LAW—Continued.

23. *Charge as to legal maxim favoring escape of innocent.*—A charge asked, in a criminal case, instructing the jury, "that it is a maxim of the law, that it is better for ten guilty men to escape than that one innocent man should suffer," tends to mislead them, and is properly refused. *Garlick v. The State*, 265.
24. *Charge as to reasonable doubt.*—A charge to the jury, in a criminal case, in these words: "In making up their verdict, and after having considered all the evidence, if the jury entertain a reasonable doubt as to the truth of any part of the evidence, they should give the defendant the benefit of that doubt, and discard all the evidence adverse to him, as to which they entertain such reasonable doubt, and give consideration to all that portion which is favorable to him, and as to which they have reasonable doubt, so that he may obtain the full benefit of every reasonable doubt; and if, after treating the entire evidence in this way, they entertain a reasonable doubt as to any material element of the offense, they should give the defendant the benefit of that doubt, and acquit him,"—"is too complicated to be given in charge to a jury, and asserts one proposition which is not sound." *Carney v. The State*, 14.
25. *Same.*—A charge asked, which claims an acquittal "if the jury have a doubt about the defendant's guilt," is properly refused: only a reasonable doubt justifies an acquittal. *Jones v. The State*, 23.
26. *Impeaching witness.*—As affecting the credibility of a witness, it is permissible to show that he entertains, or has expressed, feelings of sympathy or hostility towards the party by or against whom he is introduced, but not towards a third person who did not take part in the difficulty. *Henry v. The State*, 42.
27. *Charge ignoring proof of time and place.*—A charge is misleading, if not erroneous, which authorizes the jury to find a verdict of guilty without any consideration of the evidence as to the venue, or as to the time when the offense was committed. *Shackleford v. The State*, 26.

## FORGERY.

28. *Forgery of receipt.*—A receipt for money paid on account is an instrument in writing by which a pecuniary demand purports to be discharged or diminished, and is the subject of forgery in the second degree (Code, § 4340), if falsely forged or altered with intent to defraud. *Allen v. The State*, 34.
29. *Same; alteration of date.*—The alleged forgery being an alteration in the date of a genuine receipt, by changing 1882 to 1884, it can not be assumed, on demurrer to the indictment, that the alteration was immaterial, as increasing one demand to the same extent it purported to diminish another; but, if the evidence showed that in fact the existing indebtedness was not diminished, the payment being simply transferred from one debt to another, this would be pertinent to the inquiry whether there was an intent to defraud. *Ib.* 34.
30. *Proof of suits without production of record.*—It being shown that the altered receipt was introduced as evidence by the defendant on the trial of an action on an attachment bond, which he had instituted against the person whose name was signed to the receipt, and who had sued out an attachment against him; the action at law being collateral to the issue, it is not necessary that the records thereof should be produced before a witness can be allowed to testify in regard to them. *Ib.* 34.
31. *What writing may be subject of forgery.*—A written instrument, pur-



## CRIMINAL LAW—Continued.

porting to be an order by one person to another, to "send the money by" the person in whose favor it is drawn, not specifying any amount, may be the subject of forgery (Code, § 4340), if it has the capacity to deceive or injure, as where the person to whom it is directed has money in his hands belonging to the person whose name is signed to it. *Wright v. The State*, 262.

32. *Sufficiency of verdict*.—Where each count in the indictment charges forgery in the second degree, a general verdict of guilty, not specifying the degree, is sufficient. *Ib.* 262.

## HOMICIDE.

33. *Homicide by two persons*.—Where two persons are jointly indicted and tried for murder, and the evidence shows than one fired the fatal shot, while the other cut the deceased with a knife during the difficulty; the latter is not guilty of murder, unless the cut with the knife contributed to the death of the deceased, or unless preconcert or community of purpose between the two defendants is shown, rendering each liable for the acts of the other. *Jordan v. The State*, 9.
34. *Self-defense*.—When the plea of self-defense is relied on, it is always important to inquire who provoked the difficulty; for the party who provoked it can not set up that plea. *Jones v. The State*, 23; also, *Henry v. The State*, 43.
35. *Same*.—A charge asked, invoking the doctrine of self-defense, but ignoring the question of provocation by the defendant, which there is evidence tending to establish, and also ignoring the question whether there were any other means of escape, is properly refused. *Jones v. The State*, 23.
36. *Charge as to "legal excuse" for shooting*.—What would be a "legal excuse" for the act of shooting, is a question of technical, legal learning, which the court should define, and should not leave to the decision of the jury; and a charge which leaves it to the jury is properly refused. *Ib.* 23.
37. *Self-defense; charge as to*.—A charge asked, which bases the defendant's right to an acquittal on his reasonable apprehension of an assault, ignoring a real or apparent danger to life or limb, and also the question of retreat, is properly refused. *Hull v. The State*, 32.
38. *Charge as to inference of malice from character of weapon*.—A charge which instructs the jury, "if they believe from the character of the weapon used that the shooting was with malice, then the defendant would be guilty of murder," authorizing the inference of malice from the character of the weapon used, without regard to the other circumstances in evidence, is erroneous. *Jordan v. The State*, 9.
39. *Threats by defendant*.—A threat made by the defendant, a few minutes before the fatal difficulty, to kill "any body who hits M.," though having immediate reference to one R., who had just been quarreling with said M., is admissible as evidence against him, when it is shown that the deceased soon afterwards struck said M., and that the difficulty between him and the defendant at once ensued. *Ib.* 9.
40. *Same*.—Threats made by the defendant against the deceased, or against a class to which the deceased belonged, and *prima facie* referable to him, though his name was not mentioned, are competent and admissible as evidence against him, and it is for the jury to determine whether they, in fact, had reference to the deceased. *Harrison v. The State*, 29.
41. *Same*.—Threats made by the defendant the day before the homi-

CRIMINAL LAW—*Continued.*

- cide with which he is charged, though not naming the deceased or any other person—as, “that they were in a row, and *he would kill some of them before night*, if they did not let him alone”—are competent and admissible as evidence against him, and it is for the jury to determine, in connection with all the evidence in the case, whether they in fact had reference to the deceased. *Anderson v. The State*, 5.
42. *Dying declarations ; when admissible.*—On the facts shown in this case, the declarations of the deceased were made under a sense of almost immediate death, from the effects of a wound which he had received, and which caused his death during the same night ; and they were properly admitted as dying declarations, although partly made in answer to a question asked him. *Ib.* 5.
43. *Same ; memorandum of.*—The admissibility of dying declarations is not affected by the fact that the witness testifying to them made a written memorandum of them, which was not signed by the deceased, nor read over to him ; nor is it necessary to produce the memorandum, though the witness may refer to it to refresh his memory. *Ib.* 5.
44. *Acts or conduct of defendant before homicide ; relevancy of.*—The conduct of the defendant, a few hours before the killing, in taking his brother aside, and talking to him privately, is admissible evidence against him, “as one link in the chain of circumstances intervening during the several hours immediately prior to the killing ;” it being shown that the homicide was perpetrated with a gun, that the brother owned a gun, and that the defendant was seen, on the evening before, coming from the direction of his brother’s house, and carrying a gun. *Ib.* 5.

## INDICTMENT.

45. *Conviction of less offense than charged.*—Under an indictment for an assault with intent to murder, a conviction may be had of a simple assault, or an assault and battery ; consequently a charge, which claims an acquittal, because the evidence fails to establish the felony, is properly refused. *Jones v. The State*, 23.
46. *Abusive language, in or near dwelling-house.*—In an indictment for using abusive, insulting or obscene language, in or near a dwelling-house, or in the presence of women (Code, § 4203 ; Sess. Acts 1880–81, p. 30), it is sufficient to pursue the language of the statute, and is not necessary to specify the words used. *Weaver v. The State*, 279.
47. *Same ; averment as to ownership of house.*—When a widow marries again, and removes with her husband from her former residence, leaving her children by the first marriage in possession, the house may be described in an indictment as their dwelling-house. *Ib.* 279.
48. *Assisting prisoner to escape.*—In an indictment under this statute (Code, § 4130), a count which avers that the defendants “did assist one G., who was lawfully confined in the county jail of said county, under a charge of murder, to escape from said jail ;” or, “did, with the intent to facilitate the escape of said G. from said jail, break or blow a hole in the wall of said jail, by placing dynamite in said wall, and by igniting said dynamite ;” or, “did break the wall of said county jail, to assist said G. to escape from said jail ;” or, “did, with and by the use of dynamite, break a rock which composed a part of the wall of said county jail, to assist said G. to escape from said jail,”—is each fatally defective in describing the offense. *Hurst & Hill v. The State*, 55.

## CRIMINAL LAW—Continued.

49. *Attempt to poison ; description of poisonous substance.*—An indictment for an attempt to poison must allege that the drug, or other substance administered, was a deadly poison, or such as was calculated to destroy human life ; and the better practice is to specify the name of the drug, or other substance, or that it was unknown. *Shackleford v. The State*, 26.
50. *Larceny ; description of bank-note.*—In an indictment for larceny, it is sufficient to describe the thing stolen as "one five-dollar bill, commonly known and called *greenback*, currency of the United States, of the value of five dollars." *Levy v. The State*, 259.
51. *Perjury ; description of judicial proceeding.*—In an indictment for perjury (Code, § 4813 ; p. 995, Form No. 41), while it is sufficient to state "the substance of the proceedings," an averment that the offense was committed on the trial of A. B. "under an indictment for the offense of burglary," not stating the name of the person on whose property it was committed, is wanting in necessary certainty and definiteness. *Davis v. The State*, 20.
52. *Preferring new indictment ; limitation of prosecution.*—When a criminal prosecution is dismissed, because the indictment is not signed and indorsed as required by the statute (Code, § 4777), an entry of record may be made, stating the facts, and ordering another indictment to be found (*Ib.* § 4819) ; and a new indictment being found, the time which elapsed between the finding of the two indictments must be deducted (*Ib.* § 4820), in computing the bar of the statute of limitations. *Smith v. The State*, 21.
53. *Motion to quash indictment ; inquiry into evidence before grand jury.* The general rule is, that the refusal of the lower court to quash an indictment on motion is not revisable on error ; and if such motion may be sustained, when it is shown that there was no evidence before the grand jury, the court may properly refuse to enter into an inquiry into the sufficiency of the evidence to sustain the finding. *Bryant v. The State*, 282.

## JURORS AND JURY.

54. *Challenge of juror having fixed opinion against capital or penitentiary-punishment, and waiver of right.*—The State may challenge for cause a person summoned as a juror, in a case which may be punished capitally or by imprisonment in the penitentiary, who states that he thinks a conviction should not be had on circumstantial evidence (Code, § 4883) ; but the right of challenge on that ground is not extended to the defendant, nor can he complain of the waiver of the right by the State. *Harrison v. The State*, 29.
55. *Recalling jury before verdict.*—It is discretionary with the court to recall the jury, after they have retired to consider of their verdict, for the purpose of explaining instructions already given, giving additional instructions, or admitting evidence of some fact overlooked during the trial ; and the defendant being at the time present in person, with his attorney, and being allowed an opportunity to cross-examine the witness, there is nothing of which he can complain. *Cooper v. The State*, 54.

## LARCENY.

56. *What constitutes larceny.*—If one receives a bank-note, or other money, to be changed, and places it in his pocket, with the fraudulent intent at the time of converting it to his own use, and refuses to deliver it or the change on demand, he may be convicted of the larceny of the money so received. *Levy v. The State*, 259.



CRIMINAL LAW—*Continued.*

57. *Description of bank-note in indictment.*—In an indictment for larceny, it is sufficient to describe the thing stolen as "one five-dollar bill, commonly known and called *greenback*, currency of the United States, of the value of five dollars." *Ib.* 259.
58. *Statutory trespass on lands, cutting trees, &c.; intent to convert.* Under the statute which makes it larceny for any person to enter on the lands of another, without his consent, and cut and carry away any timber or rails, "with the intention of converting them to his own use" (Code, § 4360), the specific intent is a material ingredient of the offense, and must be alleged in the indictment. *McCord v. The State*, 269.

## LIMITATION OF PROSECUTION.

59. *Prosecution commenced before justice of the peace.*—In a prosecution for a misdemeanor, to avoid the bar of the statute of limitations (Code, § 4644), on the ground that the prosecution was commenced before a justice of the peace before the expiration of twelve months, the indictment must be, in legal effect, a continuation of that prosecution; and where a warrant was issued by a justice, but the defendant, being arrested, failed to appear, and the default was thereupon certified to the Circuit Court, but no *alias* warrant was issued,—these facts do not avoid the bar of the statute of limitations, as against an indictment found after the expiration of twelve months. *Martin v. The State*, 267.
60. *Preferring new indictment.*—When a criminal prosecution is dismissed, because the indictment is not signed and indorsed as required by the statute (Code, § 4777), an entry of record may be made, stating the facts, and ordering another indictment to be found (*Ib.* § 4819); and a new indictment being found, the time which elapsed between the finding of the two indictments must be deducted (*Ib.* § 4820), in computing the bar of the statute of limitations. *Smith v. The State*, 21.

## PERJURY.

61. *Sufficiency of indictment in describing judicial proceeding.*—In an indictment for perjury (Code, § 4813; p. 995, Form No. 41), while it is sufficient to state "the substance of the proceedings," an averment that the offense was committed on the trial of A. B. "under an indictment for the offense of burglary," not stating the name of the person on whose property it was committed, is wanting in necessary certainty and definiteness.—*Davis v. The State*, 20.

## PLEAS AND DEFENSES.

62. *Former acquittal, or conviction; continuous offense.*—Carrying a weapon concealed about the person (Code, § 4109), is necessarily an act continuous in its nature; and where it appears that the defendant, while visiting a neighboring plantation, and inviting the residents to a dance, exhibited a pistol at two houses some fifty or sixty yards apart, and has been tried and convicted (or acquitted) on the testimony of the persons at one of the houses, he can not be again prosecuted on the testimony of the persons who saw him at the other house. *Smith v. The State*, 257.
63. *Misnomer; plea in abatement, of pending prosecution.*—There is a material variance between the names *Tarpley* and *Tapley*, which would support a plea in abatement on the ground of misnomer; consequently, a pending prosecution against the defendant, by

## CRIMINAL LAW—Continued.

the latter name, can not be pleaded in abatement of a prosecution by the former. *Tarpley v. The State*, 271.

64. *Statute of limitations; supra*, 59, 60.

## POISONING.

65. *Sufficiency of indictment in description of poisonous substance*.—An indictment for an attempt to poison must allege that the drug, or other substance administered, was a deadly poison, or such as was calculated to destroy human life; and the better practice is to specify the name of the drug, or other substance, or that it was unknown. *Shackleford v. The State*, 26.
66. *Threats against third person; admissibility of*.—The prosecution having proved the defendant's threats to kill the person whom he is charged to have attempted to poison, which threats were made to a woman with whom each of them had an illicit connection, it is permissible to prove his threats, made in the same conversation, to kill the woman also. *Ib.* 26.

## REMOVING MORTGAGED PROPERTY.

67. *Subsequent satisfaction of mortgage debt*.—A subsequent payment or satisfaction of the mortgage debt, after an illegal sale or removal of the mortgaged property by the mortgagor (Code, § 4354), does not purge the illegal act of its criminality, and is no defense to a criminal prosecution. *Steed v. Knowles*, 446.

## RESISTING OFFICER.

68. *Officer de facto*.—An officer *de facto*, executing process placed in his hands, is entitled to the same protection that the law gives to an officer *de jure*; and a person who is indicted for resisting him, or escaping from him, can not be heard to question his appointment. *Floyd v. The State*, 39.

## RETAILING SPIRITUOUS LIQUORS.

69. *Constituents of offense*.—Under an indictment for selling spirituous liquors without a license, and contrary to law (Code, § 4204; Sess. Acts 1878-9, p. 71), a conviction can not be had against a person who had no interest in the liquor sold, nor in the money paid for it, and who acted only as the agent or friend of the purchaser in procuring the liquor. *Campbell v. The State*, 271.
70. *Local prohibitory law in charter of manufacturing company*.—The 4th section of the act incorporating the Tallassee Manufacturing Company Number One, approved January 29th, 1852, which makes it a misdemeanor for any person to sell intoxicating liquors, "by retail or otherwise, within four miles of the factories of said corporation," became operative as soon as the factories of the corporation were erected; and it still continues of force as a valid legislative enactment, though all the property of the corporation has been sold under a decree in chancery, and the purchasers are carrying on the same business there under a new corporate name. *Ashurst v. The State*, 276.

## SEDUCTION.

71. *Constituents of offense*.—To authorize a conviction for the seduction of an unmarried woman (Code, § 4188; Sess. Acts 1880-81, p. 48), the jury must be satisfied beyond a reasonable doubt that the seduction was accomplished under promise of marriage, or by

CRIMINAL LAW—*Continued.*

other means specified in the statute, one or more; that the relation of cause and effect existed between the alleged means and the accomplished fact. *Carney v. The State*, 14.

72. *To what witness may testify.*—A witness, testifying to the defendant's behavior or conduct towards the woman alleged to have been seduced by him, can not be permitted to state that he "*acted towards her as a suitor*," nor that he "*acted towards her as a lover*;" these being inferential facts to be found by the jury, and not such a "short-hand rendering of the facts" as a witness may state. *Ib.* 14.

## TRESPASS.

73. *Statutory trespass on lands, cutting trees, &c.; intent to convert.* Under the statute which makes it larceny for any person to enter on the lands of another, without his consent, and cut and carry away any timber or rails, "with the intention of converting them to his own use" (Code, § 4360), the specific intent is a material ingredient of the offense, and must be alleged in the indictment. *McCord v. The State*, 269.

## TRIAL, AND ITS INCIDENTS.

74. *Change of venue; when application must be made.*—An application for a change of venue, in a criminal case, is required to be made "as early as practicable before the trial" (Code, § 4911); and it comes too late when made after several postponements of the case, after an application for a continuance has been overruled, after the witnesses have been sworn and put under the rule, and after the solicitor has expressed himself satisfied with the jury. *Shackleford v. The State*, 26.
75. *To what defendant may testify as witness.*—A defendant in a criminal case, testifying as a witness for himself, can not be permitted to testify as to his own uncommunicated motives or intentions; as, that he went into the basement of a building, where he was caught setting fire to some shingles, not for the purpose of setting fire to the building, but for the purpose of getting some whiskey. *Brown v. The State*, 51.
76. *Cross-examination of defendant, testifying as witness for himself.* When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness for himself, he can not be cross-examined, against his objection, as to former indictments against him for other offenses, which are not pertinent to the issue to be tried. *Smith v. The State*, 21.
77. *Recalling jury before verdict.*—It is discretionary with the court to recall the jury, after they have retired to consider of their verdict, for the purpose of explaining instructions already given, giving additional instructions, or admitting evidence of some fact overlooked during the trial; and the defendant being at the time present in person, with his attorney, and being allowed an opportunity to cross-examine the witness, there is nothing of which he can complain. *Cooper v. The State*, 24.

## VERDICT.

78. *Conviction of less offense than charged.*—Under an indictment for an assault with intent to murder, a conviction may be had of a simple assault, or an assault and battery; consequently, a charge which claims an acquittal, because the evidence fails to establish the felony, is properly refused. *Jones v. The State*, 23.
79. *Sufficiency of verdict.*—Where each count in the indictment charges



CRIMINAL LAW—*Continued.*

forgery in the second degree, a general verdict of guilty, not specifying the degree, is sufficient. *Wright v. The State*, 262.

80. *Amendment of verdict.*—When the verdict of the jury is not in proper form, the court may inform them of the defect, before they are discharged, and instruct them to retire and consider further of it; and the defendant can not complain of this action. *Allen v. The State*, 34.

## CUSTOM.

1. *As to use of water through fire-plugs.*—In an action against a municipal corporation, to recover compensation for water furnished by plaintiff through fire-plugs, and used for sanitary purposes, evidence of an alleged custom in other cities, having water-works, to use for sanitary purposes, flushing sewers, &c., water drawn through fire-plugs, is not competent or admissible for the defendant, in the absence of evidence as to the terms of the contracts under which the water was supplied and used in those cities. *City Council v. Water-Works Co.*, 233.

## DAMAGES.

1. *Measure of damages for breach of contract, generally.*—As to the measure of damages for a breach of contract, the general rule of the common law is one of indemnity, intended to give compensation for the loss sustained, and, as far as practicable, to put the plaintiff in the same condition he would have been if the contract had been fully performed. *Snodgrass v. Reynolds*, 452.
2. *Same; as between vendor and purchaser.*—As between the vendor and the purchaser of land, where the former is unable to make title, but is guilty of no fraud or wrongful conduct, the purchaser can only recover the purchase-money paid, with interest; but this rule is exceptional, and does not apply to sales of personal property, nor to executory sales of land. *Ib.* 452.
3. *Same; as between lessor and lessee.*—As between lessor and lessee, where the latter sues for the breach of an express stipulation to put him in possession, the general rule must govern, though the lessor was guilty of no fraud or wrongful conduct; and the measure of damages is, not the consideration paid, with interest, but the value of the lease. *Ib.* 452.
4. *Same; proof of value of crops.*—The leased premises consisting of a meadow of about thirty acres, sown in "Johnson grass," a crop of which was then ready to be mowed, the plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value of each crop; not as a basis for the recovery of profits as such, but as facts to be considered by the jury in estimating the value of the use of the land during the term—that is, the value of the lease. *Ib.* 452.
5. *Measure of damages for breach of covenant, or warranty of title.*—In ordinary cases, the measure of damages which the purchaser is entitled to recover, on account of a breach of covenant of seizin, or warranty of title, is the purchase-money paid, with interest and costs of suit; but this rule does not apply to a sale of chattels, nor to cases of fraud, nor to a breach of covenant by a lessor to put the lessee in possession. *Clark v. Zeigler*, 346.
6. *Same; in case of incumbrance.*—When there is no failure of title to any part of the land, but an incumbrance on a portion of the tract, created by a prior conveyance of the right to enter and cut all the "saw timber," the measure of damages is the diminished

DAMAGES—*Continued.*

- value of the entire tract, not exceeding the entire purchase-money paid, with interest. *Ib.* 346.
7. *Value of trees cut, as proof of diminished value of land.*—In such action, the value of the trees cut under this prior license would be competent evidence, as relevant to the inquiry as to the value of such license, "because this would largely govern the extent of the diminution in value of the land;" but the value of the trees cut would not necessarily be the same as the diminished value of the land. *Ib.* 346.
  8. *Measure of damages, in action on statutory bond of bridge contractor.* In an action brought in the name of the county, on the statutory bond given by a bridge contractor (Code, §§ 1692–93), the measure of damages would be the reasonable cost of making the repairs necessary to insure the safe condition of the bridge during the period covered by the bond; and if the county has already made the repairs, on default of the contractor after notice, the amount paid, though not conclusive, is a circumstance to be considered by the jury in estimating the value of the necessary repairs. *James v. Conecuh County*, 304.
  9. *Vindictive damages against railroad company, for wrongful acts of agents or servants; vindictive damages.*—A railroad corporation is liable for all acts of wantonness, rudeness or force done or caused to be done by its agents or servants, in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons. *L. & N. Railroad Co. v. Whitman*, 328.
  10. *Damages to passenger carried beyond his destination on railroad.* In an action against a railroad company as a common carrier, by a passenger who was carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. *E. T. & Va. Railroad Co. v. Lockhart*, 315.
  11. *Same; fright and consequent injuries.*—The plaintiff, who was a young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she was not familiar, would naturally be frightened by her condition and surroundings, and attempt to walk rapidly along the track back to the station; and for damages resulting from these natural consequences of the defendant's wrongful act, a recovery may be had. *Ib.* 315.
  12. *Same; plaintiff's sickness, and roughness of track, as evidence.*—The fact that the plaintiff was sick when she left the train, though the conductor was ignorant of it, is competent and admissible evidence for her; not as an element of damages, but as tending, in connection with other circumstances, to show the relation between the subsequent aggravation of her sickness and the defendant's original wrongful act; and the rough condition of the track back to the station, over which she walked, is admissible as evidence for the same purpose. *Ib.* 315.
  13. *Same; sickness as element of damage.*—Whether the plaintiff's aggravated sickness was a proximate consequence of the defendant's wrongful act, is a question of fact for the determination of the jury; and if so found by them, it is an element of the damages she is entitled to recover. *Ib.* 315.
  14. *Measure of damages against railroad company for injuries to cattle.* The measure of the plaintiff's damages, in an action against a railroad company on account of cattle killed, is not necessarily

DAMAGES—*Continued.*

the value of the animal when alive, but the difference in value between the living animal and the dead carcass; and though he may abandon the carcass, when comparatively worthless, and recover the full value of the living animal, yet, if he converts it to his own use, or otherwise disposes of it, or if he might realize appreciable value for it by the exercise of reasonable diligence, the net amount of such value must be deducted. *Ga. Pacific Railroad Co. v. Fullerton*, 298.

15. *Same; interest.*—The plaintiff should be allowed interest on the amount of his damages, not from the commencement of his action, but from the time the injury was done. *Ib.* 298.
16. *Set-off or recoupment.*—In an action against a municipal corporation, to recover the agreed price or value of water supplied through fire-plugs, the defendant can not be allowed to set off or recoup damages sustained by private persons, citizens and property owners, on account of property destroyed by fires by reason of the insufficiency of the water supplied by plaintiff to extinguish fires; and if the defendant could, in any case, recoup damages on account of the defective quality of the water supplied, the question is not properly raised by the pleadings. *City Council v. Water-Works Co.*, 233.

## DEEDS.

1. *When covenant runs with land.*—A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's lands fifty feet wide on each side of the track, to erect a "flag-station" at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and, if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land, and is binding on an assignee with notice. *Gilmer v. M. & M. Railway Co.*, 569.
2. *Conveyance to married woman, "for her sole use and benefit."*—When lands are conveyed to a married woman, "for her sole use and benefit," her husband's marital rights are excluded, and she takes an equitable estate, which she may convey or charge by mortgage executed jointly with her husband; and the same construction and effect will be given to the words when used in a quit-claim deed. *Perdue v. Building & Loan Asso.*, 478.
3. *Conveyance by husband to wife during coverture.*—A conveyance of lands by the husband, "to the sole and proper use, benefit and behoof of" his wife, her heirs and assigns, is a mere nullity at law, neither transferring to her any legal estate or interest, nor divesting the title out of himself. *Carrington v. Richardson*, 101.
4. *Same; tenancy by curtesy, in legal and equitable estates.*—When the husband conveys land to the wife, during coverture, to her sole and separate use, and she dies after issue born alive, if he is tenant by the curtesy (which is not decided), it is only of an equitable estate; and a purchaser of that interest, under execution sale against him, does not acquire a title on which he can maintain an action of ejectment. *Ib.* 101.
5. *Title of purchaser at sale under execution.*—To authorize a recovery on a sheriff's deed, the grantee must show a judgment, execution, levy, sale and conveyance, though the recitals of the deed may make a *prima facie* case as to some of these facts; and the deed does not convey any greater estate or interest than it assumes and purports to convey, although the defendant in execution in fact had a greater interest subject to levy and sale. *Ib.* 101.
6. *Tax-deed as color of title.*—A tax-deed, though invalid as a muni-



## DEEDS—Continued.

- ment of title, may give color of title, and operate to fix and define the boundaries of an actual possession. *Hughes v. Anderson*, 209.
7. *Deed of railroad corporation, executed by agent.*—Held, re-affirming *Standifer v. Swann & Billups* (78 Ala. 88), that a conveyance of lands which belonged to the Alabama & Chattanooga Railroad Company, executed by J. C. Stanton as general superintendent and attorney in fact, without written authority from the board of directors, or other governing body of that corporation, passed no title or estate of which a court of law could take cognizance; that if the corporation be held to have ratified the act of such agent in making the sale and conveyance, by its knowledge of the facts and its failure to dissent, such ratification could only operate as an equitable estoppel, which is not cognizable at law. *Ware v. Swann & Billups*, 330.
  8. *Certificate of wife's acknowledgment.*—A certificate, appended to a mortgage of the homestead by husband and wife, which states that the wife "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion on the part of her husband," is not a substantial compliance with the statute (Code, § 2822), which uses the words "fear, constraint, or threats on the part of the husband." *Strauss & Steinhardt v. Harrison*, 324.
  9. *Proof of conveyance.*—When there are two attesting witnesses to a mortgage, or other conveyance, its execution must be proved by one or both of them, unless the case is brought within some recognized exception to the general rule; and the admission of the mortgagor or grantor himself, not made *in judicio*, does not dispense with the necessity for this proof. *Coleman v. The State*, 49.
  10. *Competency of donee or grantee as witness.*—A donee or grantee in a conveyance of property is not competent as an attesting witness to it; and if he signs it as one of the attesting witnesses, its execution can not be proved by him. *Ib.* 49.
  11. *Description of property in mortgage; parol evidence in aid of.*—A mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the general descriptive words may be made definite and certain by parol evidence showing that the parties had reference to the crop to be raised by the mortgagor on the plantation in the county which he was then cultivating. *Smith v. Fields*, 335.

## DISCONTINUANCE.

1. *Discharge of bail, by discontinuance of prosecution.*—When a person is bound over to appear at the next term of the Circuit Court, and from term to term thereafter until discharged by law (Code, § 4852), to answer for an offense with which he is charged on preliminary examination before a magistrate; if no indictment is found against him at that term of the court, no forfeiture taken, and the case not continued for further investigation, the prosecution is discontinued, and the sureties on the recognizance are discharged. *Rogers v. The State*, 59.
2. *Action on bond, against joint and several obligors; discontinuance as to one.*—On the death of one of several joint obligors, the remedy for a breach necessarily becomes several, in the absence of a statute authorizing a joint action against the survivors and the personal representative of the deceased; but, if the personal representative of the deceased is improperly joined as a defendant with the survivors, his name may be struck out by amendment, or a discontinuance entered as to him, without thereby discontinuing the action as against the others. *Reed v. Summers*, 522.

## EASEMENT.

1. *Jurisdiction of equity to enforce and protect.*—When an easement or servitude in lands is created by deed imposing a lawful restriction upon their use, a court of equity will interfere to protect and enforce it by injunction and bill in the nature of specific performance, as between the immediate parties and sub-purchasers with notice. *McMahon v. Williams*, 288.
2. *Easement created and reserved by deed; whether personal only, or appurtenant to estate.*—An easement, or servitude, created by deed, is never presumed to be personal, or in gross, when it can be fairly construed to be appurtenant to some other estate; and when the reservation naturally operates to enhance the value of the other adjacent lands of the grantor, it is a strong circumstance to indicate that it was intended to be appurtenant to the estate, and not merely personal to the grantor. *Ib.* 288.
3. *Same; case at bar.*—In this case, the owner of certain lands fronting on the river, on which he had a ware-house and landing, conveyed a part of them by deed to a steam-mill company as a site for their mill, expressly reserving to himself, his heirs and assigns, the right to erect and have a ware-house and landing on any part of the premises, and prohibiting such erection or use by the grantees, their heirs or assigns; *held*, that the easement was not personal to the grantor only, but was appurtenant to the lands, passed to a subsequent purchaser, and might be enforced by him against a sub-purchaser of the granted premises with notice. *Ib.* 288.
4. *Same; condition of forfeiture and reversion.*—A stipulation in such deed providing for a forfeiture and reversion of the granted premises, on breach of the condition, is not assignable, but is only available to the grantor or his heirs; and it does not take away the jurisdiction of equity to protect and enforce the easement at the suit of an assignee or purchaser of the dominant estate. *Ib.* 288.

## EJECTMENT.

1. *Commencement of action; declaration and notice.*—In an action of ejectment proper, the declaration and notice serve the purpose of a summons and complaint; and the commencement of the action dates, not from the time they are served on the defendant, but from the time they are placed in the hands of the sheriff to be served; and this will be presumed, in the absence of evidence to the contrary, to be the day on which the notice bears date. *Ware v. Swann & Billups*, 330.
2. *When administrator may maintain action.*—An administrator may maintain ejectment, or the statutory action in the nature of ejectment, to recover lands of which his intestate was seized of the legal title at the time of his death, against one who does not show a termination of that title, or a better title in himself. *Watson v. Prestwood & Fletcher*, 416.
3. *Same; rights of administrator, as against assignee of widow.*—On the death of the purchaser of sixteenth-section lands, while in possession under his certificate, his widow has no authority, as such, to indorse or assign the certificate to any person; and his administrator may recover the lands in ejectment against her assignee, or a sub-purchaser from him, notwithstanding the issue of a patent to the assignee. *Ib.* 416.
4. *Form and sufficiency of verdict.*—In a statutory action in the nature of ejectment, the suggestion of adverse possession and the erection of valuation improvements being found true, and the value of the improvements being assessed, or their excess above the

EJECTMENT—*Continued.*

- rents (Code, §§ 2951–54), the verdict should go further, and assess the value of the lands without the improvements. *Coltart v. Moore*, 361.
5. *Judgment on insufficient verdict; how corrected.*—Such verdict being defective, the court may set it aside during the term, and award a *venire de novo*; and a judgment rendered on it would be reversed on appeal. *Ib.* 361.
  6. *Same; waiver of irregularity.*—Judgment having been rendered on such defective verdict, but set aside, on motion, at a subsequent term, after which the cause was, for several terms, treated as a case pending and undecided; the irregularity, if any, in setting it aside, is waived, and the irregular order can not be vacated on motion, as a void judgment or order may be. *Ib.* 361.

## ELECTION. See ACTION, 4.

## ERROR AND APPEAL.

1. *When appeal lies.*—A judgment sustaining a demurrer to the complaint, and taxing the plaintiff with the costs of the motion, is not such a final judgment as will support an appeal. *Eslava v. Jones*, 287.
2. *Same.*—An appeal is given by statute (Code, § 3547) from a judgment setting aside an award, or entering it up as the judgment or decree of the court; but not from the refusal of the chancellor to enter up the award as the decree of the court, which is merely an interlocutory order. *Dudley v. Farris & McCurdy*, 187.
3. *Same.*—An appeal does not lie from the chancellor's ruling sustaining a demurrer to a petition, asking relief inconsistent with a final decree rendered at a former term, although an appeal may not be barred from that final decree. *Marshall, Davis & Co. v. McPhillips*, 145.
4. *When appeal lies.*—Under a bill filed by creditors, asking the settlement of a deed of assignment for their benefit, the court having taken jurisdiction of the trust, and ordered a reference to the register to ascertain and report who were creditors, the amount of their debts, &c, directing him to make publication, and declaring all claims barred which were not presented within the time specified; a decree rendered at the next term, on pleadings and proof, after the confirmation of the register's report, declaring those whose claims were allowed to be the only creditors, allowing their claims for the amounts respectively specified, and directing the trustee to make ratable distribution among them, to report his action from time to time to the court, and to remain under its protection and direction in the execution of the trust and the decree, is a final decree, from which an appeal will lie. *Ib.* 145.
5. *Nonsuit; what is revisable.*—When a nonsuit is taken on account of adverse rulings on evidence, only those rulings, being duly excepted to (Code, § 3112), are revisable on error, and rulings on demurrer can not be considered. *Levinshon v. Edwards*, 293.
6. *Presumption in favor of judgment.*—When the record does not set out the evidence on which the decision of the court below was founded, this court will presume that it justified the decision. *State v. Posey*, 45.
7. *Documents used before register; presumption in favor of chancellor's decision.*—When affidavits, or other documents, used before the register on a reference, are not set out in the record, this court can not make any presumption as to their contents, against the rulings of the register and the chancellor. *Winter v. City Council*, 481.



ERROR AND APPEAL—*Continued.*

8. *Revision of register's findings on facts.*—As to conclusions of fact drawn by the register on a reference, all reasonable presumptions will be indulged in support of his rulings; and they will not be disturbed, unless they are based on wrong legal principles, or are clearly shown to be erroneous on the evidence. *Gresham v. Ware*, 192.
9. *Revision of chancellor's decision on facts.*—The settled rule of this court, in reviewing the chancellor's decision on facts, is not to reverse unless clearly convinced that he erred. *Gilmer v. Wallace*, 464; *Moog v. Farley*, 246.
10. *Error without injury.*—The rule established by the later decisions of this court is, that the presumption of injury from error is repelled when, on the whole record, the court can see clearly and satisfactorily that no injury resulted from the error. *Donovan v. S. & N. Ala. Railroad Co.*, 429.
11. *Same.*—On appeal by the plaintiff below, in an action against a railroad company, for damages on account of personal injuries, the plaintiff having recovered a judgment on verdict, and the rule as to the measure of damages having been correctly stated to the jury, other charges given as to the legal liability of the defendant under the facts in evidence, if erroneous, are not ground of reversal. *Ib.* 429.
12. *Error without injury in charge given.*—The giving of an erroneous charge is not regarded as error without injury, unless, on the evidence disclosed by the record, the court might have given a general affirmative charge in favor of the appellee. *Lane & Bodley Co. v. Jones*, 156.
13. *Same, in admission of evidence prima facie irrelevant.*—The admission of evidence which is at the time *prima facie* irrelevant, but the relevancy of which is disclosed during the further progress of the trial, is not a reversible error. *Jordan v. The State*, 9.
14. *Same; admission and subsequent exclusion of evidence.*—If evidence is improperly admitted, but afterwards excluded, the error is thereby cured; but the jury should be instructed, clearly and explicitly, to discard all the evidence. *Ib.* 9.
15. *Demurrer to special plea; error without injury in ruling on.*—Improperly sustaining a demurrer to a special plea is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but the principle does not apply to the erroneous overruling of a demurrer to a bad special plea, whereby the plaintiff is compelled to take issue on it. *M. & E. Railway Co. v. Chambers & Abercrombie*, 338.
16. *Conclusiveness of former decisions.*—This will having been before this court in two former cases, which involved the same lands now in controversy, and in which the devise to the second son was sustained; the defendants in this case having bought on the faith of those decisions, and paid full value for the property; the court adheres to those decisions, as settling a rule of property for this particular case, although the plaintiff, daughter and sole surviving child of the oldest son, is not concluded by them as *res judicata*, and is not barred by the statute of limitations, and although those cases are hereby overruled on principle. *Bibb v. Bibb*, 437.

## ESTATE OF DECEDENTS.

1. *Sale of decedent's lands, under probate decree; construction of petition.*  
After the proceedings of the Probate Court, in the matter of an

ESTATE OF DECEDENTS—*Continued.*

administrator's petition for an order to sell the lands of the decedent's estate, have ripened into an order of sale and sale made under it, a liberal construction will be placed on the allegations of the petition, in order to sustain the proceedings. *Bolling v. Smith*, 535.

2. *Same, for equitable division; sufficiency of petition.*—An averment in the petition that the lands "can not be fairly, equally and beneficially divided among the heirs and distributees of said deceased, without a sale," being the equivalent of an averment that they can not be *equitably* divided without sale (Code, § 2449), is sufficient to sustain the order of sale when collaterally attacked. *Ib.* 535.
3. *Same; jurisdiction of court, when lands were owned by partnership.* Under its statutory jurisdiction to order a sale of a decedent's lands, when the same can not be equitably divided among the heirs and devisees (Code, § 2449), the Probate Court has no power to order the sale of a deceased partner's interest in partnership lands, before the partnership debts have been paid, and the accounts between the partners settled and adjusted; and the fact that the surviving partner makes the application, as administrator of the estate of the deceased partner, does not affect the principle. *Roulston v. Washington*, 529.
4. *Sale of decedent's lands under probate decree; jurisdiction of court.* The principle is settled by repeated decisions of this court, that in the matter of the sale of the lands of deceased persons, whether for the payment of debts or for distribution, the jurisdiction of the Probate Court is statutory and limited, and must affirmatively appear from the record; that this jurisdiction attaches on the filing of a petition by a proper party, setting forth a statutory ground of sale; and that where this does not appear, the order of sale is void, and the sale is a nullity. *Sermon v. Black*, 507.
5. *Same; sufficiency of petition.*—A petition filed by an administrator, alleging "that there is no personal property, or property of any character, other than that above described [certain lands], belonging to said estate, which has come to the knowledge or possession of your petitioner, and that it is necessary to sell said lands for distribution among those entitled thereto, and to defray the expenses of this administration," does not show a statutory necessity for the sale, and an order of sale founded on it is void. *Ib.* 507.
6. *Sale of decedent's lands under probate decree; when title of heirs is divested.*—A sale of lands by an administrator, under an order of the Probate Court, is the act of the court; and no title passes to the purchaser, as against the heirs or devisees, until the sale is reported and confirmed, the purchase-money paid, and a conveyance executed under the order of the court. *Comer v. Hart*, 389.
7. *Insolvent estate; removal of settlement into equity.*—To justify the removal of the settlement of an insolvent estate into equity, requires a clear and strong case—a case requiring relief which the Probate Court, on account of its want of equitable jurisdiction, can not grant. *Hardin v. Pulley*, 381.

## ESTOPPEL.

1. *Estoppel against denial of partnership.*—When a partnership has been engaged for two years, under the management of the active partner, in buying and selling on their own account, it is too late for the other partner to allege that their legitimate business was confined to selling on commission, and that the purchases were

## ESTOPPEL—Continued.

- made without his knowledge or consent. *Alabama Fertilizer Co. v. Reynolds & Lee*, 497.
2. *Estoppel by contract with corporation*.—If a party who contracts with a corporation thereby estops himself, when sued on the contract, from denying the power of the corporation to make it, as to which the decided cases are conflicting, the principle does not apply when a corporation seeks to enforce a contract as assignee of one of the original parties. *Wilks v. Ga. Pacific Railroad Co.*, 181.
  3. *Estoppel against agent*.—If the defendant acted as the plaintiff's agent in collecting fees, he would be estopped from denying the liability thereby fastened upon him, or asserting that plaintiff had not complied with the law; but the question of agency *vel non* should be submitted to the jury. *Shields v. Sheffield*, 91.
  4. *Estoppel against denying execution of note*.—When money is placed in the hands of a person to pay a note or draft at maturity, and he refuses to pay on demand by the holder, proof of the execution of the note is not necessary in an action against him, since he is estopped from denying its execution. *Levishon v. Edwards*, 293.
  5. *Estoppel by admission in answer*.—If a mortgagee, in his answer to a bill to redeem, admits the charge of usury, he is estopped from adducing evidence to the contrary; and he can only be allowed legal interest from the date of the loan. *Gresham v. Ware*, 192.

## EVIDENCE.

## ADMISSIBILITY AND RELEVANCY.

1. *Proof of fraud*.—Under a bill by creditors attacking conveyances of his property by their debtor on the ground of fraud, fraudulent practices by the debtor in prior transactions with other persons, and declarations made by him subsequent to the execution of the conveyances, are not competent evidence against the grantees. *Moog v. Farley*, 246.
2. *Proof of value of crops, as element of damages*.—In an action by lessee against his lessor, for breach of stipulation for possession, the leased premises consisting of a meadow of about thirty acres, sown in "Johnson grass," a crop of which was then ready to be mowed, the plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value of each crop; not as a basis for the recovery of profits as such, but as facts to be considered by the jury in estimating the value of the use of the land during the term—that is, the value of the lease. *Snodgrass v. Reynolds*, 452.
3. *Proof of value of trees cut from land, in action for breach of covenant*.—In such action, the value of the trees cut under this prior license would be competent evidence, as relevant to the inquiry as to the value of such license, "because this would largely govern the extent of the diminution in value of the land;" but the value of the trees cut would not necessarily be the same as the diminished value of the land. *Clark v. Zeigler*, 346.
4. *Action against railroad company, by passenger carried beyond destination; plaintiff's sickness, and roughness of track, as evidence*.—The fact that the plaintiff was sick when she left the train, though the conductor was ignorant of it, is competent and admissible evidence for her; not as an element of damages, but as tending, in connection with other circumstances, to show the relation between the subsequent aggravation of her sickness and the defendant's original wrongful act; and the rough condition of the



## EVIDENCE—Continued.

- track back to the station, over which she walked, is admissible as evidence for the same purpose. *Railroad Co. v. Lockhart*, 315.
5. *As to use of water through fire-plugs.*—In an action against a municipal corporation, to recover compensation for water furnished by plaintiff through fire-plugs, and used for sanitary purposes, evidence of an alleged custom in other cities, having water-works, to use for sanitary purposes, flushing sewers, &c., water drawn through fire-plugs, is not competent or admissible for the defendant, in the absence of evidence as to the terms of the contracts under which the water was supplied and used in those cities. *City Council v. Water-Works Co.*, 233.
  6. *Threats against third person; admissibility of.*—The prosecution having proved the defendant's threats to kill the person whom he is charged to have attempted to poison, which threats were made to a woman with whom each of them had an illicit connection, it is permissible to prove his threats, made in the same conversation, to kill the woman also. *Shackleford v. The State*, 26.
  7. *Threats by defendant.*—A threat made by the defendant, a few minutes before the fatal difficulty, to kill "any body who hits M.," though having immediate reference to one R., who had just been quarreling with said M., is admissible as evidence against him, when it is shown that the deceased soon afterwards struck said M., and that the difficulty between him and the defendant at once ensued. *Jordan v. The State*, 9.
  8. *Same.*—Threats made by the defendant against the deceased, or against a class to which the deceased belonged, and *prima facie* referable to him, though his name was not mentioned, are competent and admissible as evidence against him, and it is for the jury to determine whether they, in fact, had reference to the deceased. *Harrison v. The State*, 29.
  9. *Same.*—Threats made by the defendant the day before the homicide with which he is charged, though not naming the deceased or any other person—as, "that they were in a row, and he would kill some of them before night, if they did not let him alone"—are competent and admissible as evidence against him, and it is for the jury to determine, in connection with all the evidence in the case, whether they in fact had reference to the deceased. *Anderson v. The State*, 5.
  10. *Acts or conduct of defendant before homicide; relevancy of.*—The conduct of the defendant, a few hours before the killing, in taking his brother aside, and talking to him privately, is admissible evidence against him, "as one link in the chain of circumstances intervening during the several hours immediately prior to the killing;" it being shown that the homicide was perpetrated with a gun, that the brother owned a gun, and that the defendant was seen, on the evening before, coming from the direction of his brother's house, and carrying a gun. *Ib.* 5.
  11. *Conduct of prosecutor prior to assault; admissibility as evidence.* The difficulty between the defendant and the prosecutor, originating in a dispute about the latter's refusal to sell ice for a sick person, on request of a youth who was the defendant's cousin, having taken place in the afternoon; and it being shown that the prosecutor went, during the morning of that day, to the store of the defendant's father, to explain or talk about the matter; the fact that he was then angry or agitated, or his manner objectionable, is too far removed from the subsequent assault and battery to form a part of the *res gesta*, and is not competent evidence for the defendant for any purpose. *Henry v. The State*, 42.
  12. *Impeaching witness.*—As affecting the credibility of a witness, it is

EVIDENCE—*Continued.*

permissible to show that he entertains, or has expressed, feelings of sympathy or hostility towards the party by or against whom he is introduced, but not towards a third person who did not take part in the difficulty. *Ib.* 42.

13. *Same.*—It is permissible for the defendant to prove the fact of a previous difficulty between himself and a witness for the prosecution, as tending to show ill-will, bias or prejudice on the part of the witness, and thereby discrediting him; but the particulars or merits of the difficulty can not be inquired into. *Jordan v. The State*, 9.
14. *Witness testifying to his examination before grand jury.*—There is no error shown in allowing the prosecutor to testify to the fact that he was examined as a witness before the grand jury, since such evidence may sometimes be material, or it may have been introduced as merely preliminary to something else. *Allen v. The State*, 34.

## ADMISSIONS; DECLARATIONS; RES GESTÆ.

15. *Entries on book by agent; admissibility as evidence against principal.* Entries on the books of the carrier, made by his authorized agent in the regular course of business, and at the time the goods are received, are admissible evidence against the carrier, as forming a part of the *res gestæ* of the fact of delivery. *L. & N. Railroad Co. v. McGuire & Co.*, 395.
16. *Declarations of bank officer, while negotiating note; admissibility against accommodation indorser.*—The declaration of the cashier of the plaintiff bank, while negotiating with a debtor for the acceptance of his note, with accommodation indorsements, in payment of an existing debt, to the effect that the note would not be accepted without the indorsements of the defendant and another person, is admissible as evidence against the defendant, who afterwards indorsed the note while in the hands of the bank. *Marks v. First Nat. Bank*, 550.
17. *Admissions of grantee, as evidence for party seeking to establish resulting trust.*—The presumption being that the conveyance speaks the truth, the *onus* is on the party who seeks to establish a resulting trust in the lands, to overcome this presumption by evidence full, clear and satisfactory; and the verbal admissions or declarations of the grantee, while admissible as evidence against him, are not sufficient, unless plain and consistent with themselves, or corroborated by circumstances. *Bibb v. Hunter*, 351.
18. *Dying declarations; when admissible.*—On the facts shown in this case, the declarations of the deceased were made under a sense of almost immediate death, from the effects of a wound which he had received, and which caused his death during the same night; and they were properly admitted as dying declarations, although partly made in answer to a question asked him. *Anderson v. The State*, 5.
19. *Same; memorandum of.*—The admissibility of dying declarations is not affected by the fact that the witness testifying to them made a written memorandum of them, which was not signed by the deceased, nor read over to him; nor is it necessary to produce the memorandum, though the witness may refer to it to refresh his memory. *Ib.* 5.

## BURDEN OF PROOF; WEIGHT AND SUFFICIENCY.

20. *Burden of proof, in action against railroad company.*—In an action against a railroad company, for injuries to cattle (Code, §§ 1699, 1700), the *onus* is on the defendant to prove a compliance with all the statutory requirements. *Railroad Co. v. Deaver*, 216.

## EVIDENCE—Continued.

21. *Burden of proof as to consideration, and as to fraudulent intent.*—When the attacking creditor has proved the existence of his debt at the time of the sale and conveyance, the *onus* is cast on the grantee or purchaser to show the payment of a valuable and adequate consideration; and such payment being shown, the question of intent becomes material; as to which the *onus* is shifted to the complainant, and he must show a fraudulent intent on the part of his debtor, and the grantee's knowledge thereof or participation. *Moog v. Farley*, 246.
22. *Contributory negligence; burden of proof as to.*—Contributory negligence is a defense, the burden of proving which rests on the defendant, although it may be negatived by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. *M. & E. Railway Co. v. Chambers & Abercrombie*, 338.
23. *Burden of proof as to notice.*—When the holder of commercial paper has proved his purchase of it for valuable consideration before maturity, the *onus* of proving knowledge or notice of any defect or infirmity in the paper is on the party who assails his title. *Morton & Bliss v. Railroad Co.*, 592.
24. *Charge as to legal maxim favoring escape of innocent.*—A charge asked, in a criminal case, instructing the jury, "that it is a maxim of the law, that it is better for ten guilty men to escape than that one innocent man should suffer," tends to mislead them, and is properly refused. *Garlick v. The State*, 265.
25. *Reasonable doubt; charge as to.*—A charge asked, which claims an acquittal "if the jury have a doubt about the defendant's guilt," is properly refused: only a reasonable doubt justifies an acquittal. *Jones v. The State*, 23.

## OBJECTIONS.

26. *Error without injury; in admission of evidence prima facie irrelevant.*—The admission of evidence which is at the time *prima facie* irrelevant, but the relevancy of which is disclosed during the further progress of the trial, is not a reversible error.—*Jordan v. The State*, 9.
27. *Same; admission and subsequent exclusion of evidence.*—If evidence is improperly admitted, but afterwards excluded, the error is thereby cured; but the jury should be instructed, clearly and explicitly, to discard the evidence altogether. *Ib.* 9.
28. *Admission of evidence generally.*—When evidence is offered and admitted generally, no specific purpose being mentioned, and it is admissible for any legal purpose, it will be presumed to have been admitted for that purpose, unless the bill of exceptions shows the contrary. *Snodgrass v. Reynolds*, 452.

## OPINION; LEGAL CONCLUSION.

29. *Testimony of witness or party, as to motive or intent.*—The motive or intent with which an act is done, or refused to be done, is an inferential fact, to which a witness can not testify, for want of the requisite knowledge; and the principle is, with us, extended to a party testifying as a witness for himself, because such testimony is not susceptible of contradiction. *Ala. Fertilizer Co. v. Reynolds & Lee*, 497; *Kyle v. Bellenger*, 516.
30. *Opinion of witness; when admissible.*—As to the amount and value of the personal property in a city at a particular past time, or during specified years, the opinions of witnesses can not be received, when they do not appear to be founded on knowledge of the facts. *Winter v. City Council*, 481.



## EVIDENCE—Continued.

31. *To what witness may testify.*—A witness, testifying to the defendant's behavior or conduct towards the woman alleged to have been seduced by him, can not be permitted to state that he "acted towards her as a suitor," nor that he "acted towards her as a lover;" these being inferential facts to be found by the jury, and not such a "short-hand rendering of the facts" as a witness may state. *Carney v. State*, 14.

## PAROL AND WRITTEN EVIDENCE.

32. *Description of property in mortgage; parol evidence in aid of.*—A mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the general descriptive words may be made definite and certain by parol evidence showing that the parties had reference to the crop to be raised by the mortgagor on the plantation in the county which he was then cultivating. *Smith v. Fields*, 335.

## PRESUMPTIONS.

33. *Presumption as to character of wife's estate.*—In this State, property belonging to a married woman is presumed, in the absence of averment and proof to the contrary, to constitute a part of her statutory estate; and no presumption that it is an equitable estate will be indulged against the husband, when he is the plaintiff in the action, although his right of action depends on the estate being statutory. *Steed v. Knowles*, 446.
34. *Presumption against party failing to produce witness.*—A party is not bound to produce all the witnesses who may know something about the transactions involved in the issues, nor is any presumption indulged against him on account of his failure to produce them; though, when a witness possesses peculiar knowledge, supposed to be favorable to the party who can produce him, the failure to produce him, if unexplained, is ground of suspicion against that party. *Carter v. Chambers*, 223.

## PRIMARY AND SECONDARY.

35. *Proof of notice.*—Plaintiff's agent having four copies of a notice to be served on the defendants, delivering a copy to each of the three, and retaining one copy, which is produced on the trial, notice to produce the copies served is not necessary to render it competent as evidence, since each of the four papers is equally an original. *Westbrook v. Fulton*, 510.
36. *Proof of receipt of goods by carrier.*—In an action against a common carrier for the loss of goods, his receipt of the goods may be proved without producing a bill of lading, or accounting for the failure to produce it. *L. & N. Railroad Co. v. McGuire & Co.*, 395.
37. *Rule as to production of best evidence.*—By the established rule, the best evidence the nature of the question admits of may be received, but not the best evidence the exigencies of the particular case admit of; and the inability of a party, through accident or misfortune, to adduce legal evidence, does not authorize the admission of illegal evidence. *Comer v. Hart*, 389.
38. *Proof of conveyance.*—When there are two attesting witnesses to a mortgage, or other conveyance, its execution must be proved by one or both of them, unless the case is brought within some recognized exception to the general rule; and the admission of the mortgagor or grantor himself, not made *in judicio*, does not dispense with the necessity for this proof. *Coleman v. The State*, 49.

## EVIDENCE—Continued.

39. *Proof of foreign statute.*—To render a book self-proving, and admissible as evidence of foreign statutes, public or private, or of legislative proceedings (Code, § 3045), it must appear to be published, not only "by authority," but by authority of the particular State, territory or government therein specified. *Edmunds v. The State*, 48.
40. *Proof of suits without production of record.*—It being shown that the altered receipt was introduced as evidence by the defendant on the trial of an action on an attachment bond, which he had instituted against the person whose name was signed to the receipt, and who had sued out an attachment against him; the action at law being collateral to the issue, it is not necessary that the records thereof should be produced before a witness can be allowed to testify in regard to them. *Allen v. The State*, 34.
41. *Memorandum of dying declaration.*—The admissibility of dying declarations is not affected by the fact that the witness testifying to them made a written memorandum of them, which was not signed by the deceased, nor read over to him; nor is it necessary to produce the memorandum, though the witness may refer to it to refresh his memory. *Anderson v. The State*, 5.

## VARIANCE.

42. *Action for damages, by passenger against railroad company.*—Under a complaint, in an action against a railroad company, which claims damages on account of the conductor's refusal to stop his train and put plaintiff off at the proper station, alleging that he "willfully refused" to stop, and carried her several hundred yards beyond, "without her consent, and against her protest;" if the evidence shows that the conductor only neglected to stop, and that the plaintiff not only submitted, but consented to alight at the further place, without objection or protest, there is a fatal variance between the averments and the proof. *L. & N. Railroad Co. v. Johnston*, 436.
43. *Indictment for assault; description of weapon.*—Under an indictment which charges an assault with a razor, a conviction may be had on proof of an assault with a pocket-knife; the two instruments being of the same kind, and the character of the wounds inflicted being substantially the same, the variance is immaterial. *Hull v. The State*, 32.
44. *Averment and proof of ownership of house.*—In an indictment for arson, or attempted arson, the ownership of the building may be charged to be in A or B disjunctively (Code, § 4798); and if the evidence shows that it belonged to A, B and C jointly (Sess. Acts 1878-9, p. 46), the variance is immaterial. *Brown v. The State*, 51.
45. *Ownership of house; averment and proof of.*—When a widow marries again, and removes with her husband from her former residence, leaving her children by the first marriage in possession, the house may be described in an indictment as their dwelling-house. *Weaver v. The State*, 279.

## EXECUTION.

1. *Title of purchaser at sale under execution.*—To authorize a recovery on a sheriff's deed, the grantee must show a judgment, execution, levy, sale and conveyance, though the recitals of the deed may make a *prima facie* case as to some of these facts; and the deed does not convey any greater estate or interest than it assumes and purports to convey, although the defendant in execu-

## EXECUTION—Continued.

- tion in fact had a greater interest subject to levy and sale. *Car-  
rington v. Richardson*, 101.
2. *Same; tenancy by curtesy, in legal and equitable estates.*—When the husband conveys land to the wife, during coverture, to her sole and separate use, and she dies after issue born alive, if he is tenant by the curtesy (which is not decided), it is only of an equitable estate; and a purchaser of that interest, under execution sale against him, does not acquire a title on which he can maintain an action of ejectment. *Ib.* 101.
  3. *Execution or attachment against individual partner, levied on partnership property.*—When an execution or attachment against an individual partner is levied on the partnership property, the purchaser at a sale under the levy acquires only that partner's interest in the assets which may remain after the partnership debts have been paid and the partnership affairs adjusted; and this can only be ascertained by an account in equity. *Farley, Spear & Co. v. Moog*, 148.

## EXECUTORS AND ADMINISTRATORS.

1. *When administrator may maintain action.*—An administrator may maintain ejectment, or the statutory action in the nature of ejectment, to recover lands of which his intestate was seized of the legal title at the time of his death, against one who does not show a termination of that title, or a better title in himself. *Watson v. Prestwood & Fletcher*, 416.
2. *Extinguishment of debt, by appointment of debtor as administrator of creditor's estate.*—When the executor of a deceased creditor recovers a judgment against the debtor, and the latter becomes his successor in the administration, the judgment is extinguished by operation of law, the duty to pay and the right to receive being united in the same person. *Lane v. Westmoreland*, 372.
3. *Adverse possession, as between administrator and heirs.*—When an administrator takes possession, in his representative capacity, of his intestate's lands, his possession is not adverse to the heirs, and the statute of limitations does not begin to run in his favor, as against them, until there is a public or notorious change in the nature of his holding; and the fact that he sold the lands under a probate decree, becoming himself the purchaser, does not render his subsequent possession adverse to the heirs, when it is not shown that the sale was ever reported and confirmed, and a conveyance executed to him under the order of the court. *Comer v. Hart*, 389.
4. *Grant of administration by probate judge to his son, and revocation thereof.*—A grant of letters of administration by a probate judge to his own son, though irregular, erroneous, and voidable, is not absolutely void; and it may be revoked, on the application of any person having an interest, by the register in chancery, sitting as probate judge *pro hac vice*. *Koger v. Franklin*, 505.
5. *Revocation of administration improvidently granted.*—When letters of administration have been granted improvidently, or irregularly, the court granting has inherent power to revoke them, either *ex mero motu*, or on application of any person in interest. *Ib.* 505.
6. *Jurisdiction of Probate Court, when administrator occupies antagonistic positions.*—When the surviving partner becomes, jointly with another person, administrator of the estate of his deceased partner, he can not make a settlement of the partnership accounts in the Probate Court, in connection with the settlement of the administration; that court having no jurisdiction of partnership matters, nor of a settlement made by the administrator with himself in such dual capacity. *Vincent v. Martin*, 540.



EXECUTORS AND ADMINISTRATORS—*Continued.*

7. *Equitable relief against probate decree, in matter of settlement of administrator's accounts.*—A bill which seeks equitable relief against a probate decree on final settlement of an administrator's accounts, on the ground of alleged errors of law and fact, must negative all fault or negligence on the part of the complainant. *Ib.* 540.

## EXEMPTIONS.

1. *Homestead exemption ; against what process available.*—The statute which declares that a homestead, of specified value and quantity, "shall be exempt from levy and sale under execution, or other process for the collection of debts" (Code, § 2820), applies not only to formal and technical process, but to any judicial proceeding, at law or in equity, which seeks the appropriation of the property to the payment of debts. *Hines v. Duncan*, 112.
2. *Same ; occupancy.*—When the character of a homestead has been impressed upon a house and lot by actual occupancy, it is not lost by a leasing for twelve months or less (Code, § 2843); but the right of exemption does not attach without actual occupancy, and is lost by failure to resume possession, in case of lease, at or before the expiration of twelve months. *Ib.* 112.
3. *Same ; as against bill in equity by creditor seeking to subject equitable estate of married woman.*—A bill in equity by a creditor of a married woman, seeking to subject her equitable estate to the payment of a debt created by contract, creates a lien on the property from the service of process; against which lien a claim of homestead exemption can not prevail, unless the right of exemption existed when the bill was filed. *Ib.* 112.
4. *Mortgage of homestead.*—A mortgage of the homestead by husband and wife, the voluntary signature and assent of the wife not being shown and certified as required by law (Code, § 2822), is a mere nullity, and has no operation against the husband, by estoppel or otherwise; and a subsequent promise by him, after default, to pay rent to the mortgagee, no surrender or change of possession being shown, is without consideration, and does not create the relation of landlord and tenant between them. *Strauss & Steinhardt v. Harrison*, 324.
5. *Same ; certificate of wife's acknowledgment.*—A certificate, appended to a mortgage of the homestead by husband and wife, which states that the wife "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or persuasion on the part of her husband," is not a substantial compliance with the statute (Code, § 2822), which uses the words "fear, constraint, or threats on the part of the husband." *Strauss & Steinhardt v. Harrison*, 324.
6. *Exemptions to partners.*—Partners can not claim an individual exemption in the partnership property, during the continuance of the partnership; but, when one partner sells out his interest to the other, without reservation, the effects become the exclusive property of the purchaser, discharged from any lien on account of partnership debts, and he may claim an exemption in them, as against the partnership creditors, if the sale was fair and *bona fide*. *Levy & Co. v. Williams*, 171.
7. *Exemptions of personalty to decedent's family; when and how made.* Although the statute contemplates that all personal property, not specifically bequeathed, shall be included in the administrator's inventory, and that a selection of exemptions may be made from the property so inventoried; yet a selection may be made from property not included in the inventory, and even before an inventory is filed. *Hardin v. Pulley*, 381.

EXEMPTIONS—*Continued.*

8. *Same.*—Where an infant's guardian selected for him, as exempt, all the personal property included in the inventory, which was appraised at \$400; and the administrator afterwards received and sold other personal property, accounting for the proceeds, after the estate had been declared insolvent, on final settlement of his accounts as administrator; on which settlement the infant was represented by a guardian *ad litem*, and no additional claim of exemptions was made; the surety on the administrator's official bond is not liable to the infant for the loss of any additional exemptions to which he might have been entitled. *Ib.* 381.

## FEES.

1. *Fees of witnesses summoned but not examined; re-taxation of costs.* The fees of witnesses summoned by the successful party, but not examined by him, can not be taxed as a part of the cost in his favor, unless he shows to the court, by affidavit or otherwise, that there was a real or apprehended necessity for them; and when improperly included, the unsuccessful party may have the costs re-taxed under the statute (Code, § 3146), which is but a substantial affirmation of the pre-existing rule. *Forcheimer & Co. v. Kaver*, 285.
2. *Printer's fees for advertising sales of lands for delinquent taxes; when payable out of State treasury.*—Under the provisions of the act approved February 12th, 1879, amending section 439 of the Code (Sess. Acts 1878-9, p. 21), the printer's fee for advertising the sale of lands for delinquent taxes must be paid out of the State treasury, on the auditor's warrant in his favor, *only* when the State became the purchaser at the tax-sale, or when the fee has been collected and paid into the treasury. *Burke v. Blan*, 97.
3. *Same, for advertising notices to delinquent tax-payers.*—Under the provisions of the act approved February 12th, 1879, providing for the sale of lands for delinquent taxes (Sess. Acts 1878-9, pp. 1-7, §§ 3, 4, 10), the printer's fee for advertising notices to delinquent tax-payers is required to be ascertained by the judge of probate, and included in the amount for which a decree of sale is rendered, and is made payable out of the proceeds of sale; but, when the State becomes the purchaser, the auditor is not required to draw his warrant on the treasury in favor of the printer, except on the production of an order by the judge of probate. *Ib.* 97.
4. *Fees of tax-collector for notices to delinquents.*—Under the provisions of the act incorporating the port of Mobile, and providing for the government thereof (Sess. Acts 1878-9, p. 406, § 24), the tax-collector is not entitled to any fee for making a personal demand on delinquent tax-payers, but only where, not being able to find delinquents, he leaves "written or printed notice at their place of residence;" and leaving such notice at any other place would not be sufficient, unless it is also shown that it was actually received by the delinquent. *Shields v. Sheffield*, 91.

## FENCES.

1. *Uninclosed lands; cattle running at large.*—In this State, except where the rule is changed by local statutes, uninclosed lands are regarded as common of pasturage, over which cattle or stock may be suffered to run at large; and if the owner of the land desires to protect himself against damage, he must erect and maintain a lawful fence around them. *Wilhite v. Speakman*, 400.
2. *Same; rights and liabilities of owner, in cases of trespassing cattle.* Where lands are not inclosed by a lawful fence (Code, §§ 1586-7), the rights of the owner, as against cattle or stock running at large,

FENCES—*Continued.*

are only defensive: he may have the trespassing animals estrayed, and may use all proper means to drive them out of his field, taking care to employ no unnecessary force; but, for any injury which is the natural or proximate consequence of a wrongful act on his part, outside of these defensive measure, he is liable to the statutory penalty of five times the amount of the injury. *Ib.* 400.

3. *Same; case at bar.*—The plaintiff's horse having been caught by the defendant while trespassing in his field, which was not inclosed with a lawful fence, and tied with a rope to the limb of a tree, where he was found dead the next morning, the appearances indicating that he had been choked to death; the liability of the defendant to the statutory penalty does not depend on the question of negligence *vel non* in the treatment and care of the horse, but, his act being unlawful, on the question whether the death of the animal was the natural and proximate consequence thereof. *Ib.* 400.

FORGERY. See CRIMINAL LAW, 28-32.

## FRAUD.

1. *Proof of fraud.*—Under a bill by creditors attacking conveyances of his property by their debtor on the ground of fraud, fraudulent practices by the debtor in prior transactions with other persons, and declarations made by him subsequent to the execution of the conveyances, are not competent evidence against the grantees. *Moog v. Farley*, 246.
2. *Fraud in sale of chattels.*—On a sale of chattels, a misrepresentation of a material fact by the vendor, on which the purchaser has a right to rely, and on which he does in fact rely, as an inducement to the contract, is a fraud, and is available as a defense to an action for the purchase-money, or a separate cause of action in favor of the purchaser. *Brown v. Freeman & Bynum*, 406.
3. *Same; matter of opinion.*—A representation which is in the nature of an expressed opinion, does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances, it may often constitute a warranty. *Ib.* 406.
4. *Same; question for jury.*—Whether the representation was intended as the statement of a fact, or as the mere expression of an opinion, is a question for the determination of the jury, when it does not involve the construction of a written instrument. *Ib.* 406.
5. *Fraudulent purchase of goods by insolvent debtor, and subsequent transfer.*—When an insolvent debtor obtains goods on credit by misrepresentation or fraudulent concealment of his condition, the seller may disaffirm the sale, and reclaim the goods, as against the fraudulent purchaser, or any one claiming under him, with notice of the fraud; but he can not maintain a bill in equity to set aside the subsequent transfer of the goods on account of such fraud, when the transfer was made in absolute payment of an honest debt, a fair price allowed for the goods, and no benefit reserved to the insolvent debtor. *Hornthall, Whitehead, Weissman & Co. v. Schonfeld*, 107.
6. *Fraud of maker, as defense to accommodation indorser.*—If an accommodation indorsement is procured by the fraud of the maker, in concealing a condition annexed to a prior indorsement, the payee not having knowledge or notice of such fraud when he accepts the note as payment, such fraud is no defense to the accommodation indorser. *Marks v. First Nat. Bank*, 550.



## FRAUDS, STATUTE OF.

1. *Promise to pay debt of another person.*—A promise by a county school superintendent to pay, out of the funds in his hands in his official capacity, a debt due by one of the teachers to a third person, which was contracted on the faith of the moneys in his hands, or which he might receive, is not within the statute of frauds (Code, § 2121, subd. 3). *Wright v. The State*, 262.

## FRAUDULENT CONVEYANCES.

1. *Sale of goods by insolvent debtor to creditor; validity as against other creditors.*—A sale of his property by an insolvent debtor, at a fair and adequate price, in absolute payment of an honest debt, without reserving any benefit whatever to himself, will be sustained by the courts as a valid exercise of his right of preference, although made with a fraudulent intent on his part, of which the purchasing creditor was cognizant. *Hornthall v. Schonfeld*, 107.
2. *Same; fraudulent purchase of goods by insolvent debtor, and subsequent transfer.*—When an insolvent debtor obtains goods on credit by misrepresentation or fraudulent concealment of his condition, the seller may disaffirm the sale, and reclaim the goods, as against the fraudulent purchaser, or any one claiming under him with notice of the fraud; but he can not maintain a bill in equity to set aside a subsequent transfer of the goods on account of such fraud, when the transfer was made in absolute payment of an honest debt, a fair price allowed for the goods, and no benefit reserved for the insolvent debtor. *Ib.* 107.
3. *Sale by insolvent debtor to creditor; validity as against other creditors.* A failing or insolvent debtor may sell a part, or the whole of his property, in payment of an antecedent debt, to the exclusion of his other creditors; and if the debt is *bona fide*, its amount not materially less than the value of the property, and no use or benefit is reserved or secured to the debtor, the transaction will be sustained, without regard to any attendant circumstances or badges of fraud, the intentions of the debtor himself, or notice of his intentions on the part of the purchasing creditor. *Levy & Co. v. Williams*, 171.
4. *Same.*—The purchasing creditor can not go beyond the permissible purpose of securing the payment of his own debt, and, in effecting this purpose, must not unnecessarily hinder or delay other creditors, or impair their rights, by placing it in the power of the debtor to effectually screen a part of the proceeds of sale, when he has knowledge of facts sufficient to create a reasonable belief of such intention; and when his purchase is made partly in payment of an antecedent debt, and partly for money paid, the same rule is applicable as to purchases on a new consideration, and the payment of the past debt is a circumstance to be considered in determining the good faith of the transaction. *Ib.* 171.
5. *Same.*—Although the purchase may exceed the amount of the purchaser's debt, the fact of such excess does not invalidate the transaction, when reasonably necessary for attaining the lawful purpose of satisfying the debt; but this means, not a necessity created by the debtor's unyielding demand for cash, but a reasonable necessity arising from the nature, situation, or condition of the property. *Ib.* 171.
6. *Same; as applied to this case.*—In this case, the evidence establishing the insolvency of the debtor at the time the sale was made, and his fraudulent intent to convert his lands into money, not for the payment of his debts, but for the avowed purpose of procuring family supplies and enabling him to carry on his business, the purchasing creditors having knowledge of his embarrassed condition, and notice of facts sufficient to charge them with know-

FRAUDULENT CONVEYANCES—*Continued.*

ledge of such fraudulent intent; *held*, that their purchase of three tracts of lands, at the aggregate price of \$1,000, of which amount \$600 was paid in cash, and the balance in satisfaction of the creditor's antecedent debt, was fraudulent as against other creditors, although the debtor refused to sell any one parcel of the land separately. *Ib.* 171.

7. *Conveyance sustained, when equity would have compelled it.*—Where the debtor, being indebted to his brother for services as his clerk, bought a tract of land for him, at his instance, but took the title in his own name, afterwards promising to execute a proper conveyance, but failing to do so for several years, during which time the brother occupied, cultivated and improved the land; *held*, that a conveyance executed after the lapse of four years, when the debtor had become insolvent, would be regarded as the voluntary performance of an act which a court of equity would have compelled, and the transaction would be sustained. *Moog v. Farley*, 246.
8. *Conveyance of stock of goods by insolvent debtor to his brother, in consideration of services rendered as clerk.*—In this case, an insolvent debtor having conveyed to his brother a stock of goods valued at \$6,000, but not worth so much, in payment of a recited debt of \$8,000; the transaction was sustained against the attack of creditors, affirming the chancellor's decree, on proof that the grantee had acted as clerk and salesman in the store of the grantor, for fifteen years; that it was agreed his compensation should be reasonable, but no amount was stipulated; that no account was kept with him on the books; that he was an unmarried man, was economical, and boarded in the family of the grantor; that he had been promised an interest in the business as a partner; that no former settlements were ever made, though often demanded by him, and often promised; and that no memorandum was kept of the settlement at which \$8,000 was agreed on as the amount of the indebtedness. *Ib.* 246.
9. *Conveyance in name of third person; burden of proof as to ownership of money paid.*—Property purchased by a debtor, and paid for with his money, is liable to the satisfaction of his debts, though the title be taken in the name of another person; but the burden of proving these facts is on the attacking creditor, and, if he fails to prove that the money paid belonged to his debtor, the source from which it was derived, or its real ownership, is immaterial. *Ib.* 246.
10. *Transactions between relatives.*—A transaction between relatives will be more closely scrutinized by the courts, at the instance of creditors, than a transaction between strangers; yet relationship is not, of itself, sufficient to stamp a transaction as fraudulent; and a *bona fide* creditor, closely allied to his insolvent debtor, may take property at a fair price in payment of his debt, as any other creditor might. *Ib.* 246.
11. *Purchase of property of insolvent debtor, by his brother.*—The insolvent debtor being indebted to his brother for borrowed money, and being unable to pay it on demand, in order that it might be invested in real estate, may lawfully convey property, at its fair value, in payment of the debt; and if the value of the property is greater than the amount of the debt, and the difference is paid to the debtor in money, and is used by him in the payment of other debts, the transaction will be sustained against creditors, when it is not shown that the grantee had knowledge of the debtor's pecuniary condition; though, in the absence of evidence as to such application of the money, or if notice had been brought home to

FRAUDULENT CONVEYANCES—*Continued.*

the grantee of the debtor's intention thus to prefer creditors, the court would be inclined to hold the sale fraudulent as against the creditors not paid. *Ib.* 246.

12. *When creditor without lien may come into equity to set aside fraudulent conveyance.*—By statutory provision (Code, §§ 3886), a creditor without a lien, or by simple contract only, may file a bill in equity to subject to the payment of his debt property which his debtor has fraudulently transferred, or attempted to transfer; but he can not file such a bill before the maturity of his debt, though he might sue out an attachment at law. *Jones v. Massey*, 370.

GARNISHMENT. See ATTACHMENT.

HOMESTEAD. See EXEMPTIONS.

## HUSBAND AND WIFE.

1. *Removal of husband as trustee of wife's estate.*—On the testimony in this case, showing that the husband had permanently abandoned his wife, wasted her income by consuming it for his own personal use, grossly disregarded his fiduciary duties, was profligate and unfit for the discreet management of her property, the chancellor properly removed him as her trustee (Code, §§ 2717, 2728-9); and the character of her estate, whether statutory or equitable, is immaterial. *Kraft v. Lohman*, 323.
2. *Conveyance to married woman, "for her sole use and benefit."*—When lands are conveyed to a married woman, "for her sole use and benefit," her husband's marital rights are excluded, and she takes an equitable estate, which she may convey or charge by mortgage executed jointly with her husband; and the same construction and effect will be given to the words when used in a quit-claim deed. *Perdue v. Building & Loan Asso.*, 478.
3. *Conveyance by husband to wife during coverture.*—A conveyance of lands by the husband, "to the sole and proper use, benefit and behoof of" his wife, her heirs and assigns, is a mere nullity at law, neither transferring to her any legal estate or interest, nor divesting the title out of himself. *Carrington v. Richardson*, 101.
4. *Same; tenancy by curtesy, in legal and equitable estates.*—When the husband conveys land to the wife, during coverture, to her sole and separate use, and she dies after issue born alive, if he is tenant by the curtesy (which is not decided), it is only of an equitable estate; and a purchaser of that interest, under execution sale against him, does not acquire a title on which he can maintain an action of ejectment. *Ib.* 101.
5. *Mortgage of wife's property.*—As to property belonging to the equitable estate of a married woman, she is regarded as a *femme sole*, and may mortgage it for her own debt, or for the debt of her husband; but a mortgage of property belonging to her statutory estate, executed by her and her husband jointly, to secure her own debt or her husband's, is absolutely void, and creates no lien on the property. *Steed v. Knowles*, 446.
6. *Presumption as to character of wife's estate.*—In this State, property belonging to a married woman is presumed, in the absence of averment and proof to the contrary, to constitute a part of her statutory estate; and no presumption that it is an equitable estate will be indulged against the husband, when he is the plaintiff in the action, although his right of action depends on the estate being statutory. *Ib.* 446.
7. *Certificate of wife's acknowledgment.*—A certificate, appended to a mortgage of the homestead by husband and wife, which states



HUSBAND AND WIFE—*Continued.*

that the wife "acknowledged that she signed the same of her own free will and accord, and without fear, constraint, or *persuasion* on the part of her husband," is not a substantial compliance with the statute (Code, § 2822), which uses the words "fear, constraint, or *threats* on the part of the husband." *Strauss & Steinhardt v. Harrison*, 324.

8. *Wife as party to bill against husband.*—When a married woman joins with her husband in a mortgage of lands, the legal title to which stands in his name, she is not a necessary party to a bill for foreclosure, even if she claims an equity in the lands on the ground that her funds were used in paying the purchase-money; and not being made a party, her rights would not be affected by the decree; yet she may be made a party, in order that she may be bound by the decree. *Flowers v. Baker*, 445.
9. *Consent decree against married woman.*—In the absence of fraud in its procurement, or other special cause shown, a consent decree is as binding on a married woman as on a person *sui juris*. *Winter v. City Council*, 481.

INDICTMENT. See CRIMINAL LAW, 46-53.

## INFANTS.

1. *Contracts of infants.*—A minor nineteen years of age, whose father is dead, whose mother is married again, and who has no guardian, may lawfully contract to perform personal services for another, and may receive partial payment in money and goods during the term of service, thereby discharging his employer to that extent, without regard to the strict rule limiting the liability of an infant for necessities. *Waugh v. Emerson*, 295.
2. *Appointment of minor as special constable.*—A minor is not eligible to the office of constable; but, when specially appointed by a justice of the peace to execute a particular process (Code, § 768), he is an officer *de facto*. *Floyd v. The State*, 39.
3. *Laches of infant, or guardian.*—As a general rule, *laches* will not be imputed to an infant, and his rights are not waived by his failure to assert them promptly; but there are cases in which his rights may be lost by the failure of his guardian to assert them, leaving him only the personal liability of the guardian for indemnity. *Hardin v. Pulley*, 381.

INJUNCTION. See CHANCERY, 9-12.

INSOLVENT ESTATE. See CHANCERY, 13.

## INTEREST.

1. *On damages.*—In an action against a railroad corporation, to recover damages for cattle killed, the plaintiff should be allowed interest on the amount of his damages, not from the commencement of his action, but from the time the injury was done. *Railroad Co. v. Fullerton*, 298.
2. *On promissory note.*—A promissory note, payable at a future day, "with interest" at a specified rate, bears interest from date, since it would, without these words, bear interest from maturity. *Campbell Printing Press Co. v. Jones*, 475.

## JUDGMENTS AND DECREES.

1. *Judgment on insufficient verdict, in ejectment; setting aside on motion; waiver of irregularity.*—In a statutory action in the nature of ejectment, the suggestion of adverse possession and erection of

JUDGMENTS AND DECREES—*Continued.*

valuable improvements being found true, and the value of the improvements being assessed, or their excess above the rents (Code, §§ 2951-54), the verdict should go further, and assess the value of the lands without the improvements. Such verdict being defective, the court may set it aside during the term, and award a *venire de novo*; and a judgment rendered on it would be reversed on appeal. Judgment having been rendered on it, but set aside, on motion, at a subsequent term, after which the cause was, for several terms, treated as a case pending and undecided; the irregularity, if any, in setting it aside, is waived, and the irregular order can not be vacated on motion, as a void judgment or order may be. *Cottart v. Moore*, 361.

2. *Injunction against judgment at law*.—A defendant in a judgment at law can not have equitable relief against it, because it is either erroneous or void; since, if void, it may be disregarded, or set aside on motion; and if erroneous, it may be revised on appeal. *Murphree v. Bishop*, 404.
3. *What is final decree*.—Under a bill filed by creditors, asking the settlement of a deed of assignment for their benefit, the court having taken jurisdiction of the trust, and ordered a reference to the register to ascertain and report who were creditors, the amount of their debts, &c, directing him to make publication, and declaring all claims barred which were not presented within the time specified; a decree rendered at the next term, on pleadings and proof, after the confirmation of the register's report, declaring those whose claims were allowed to be the only creditors, allowing their claims for the amounts respectively specified, and directing the trustee to make ratable distribution among them, to report his action from time to time to the court, and to remain under its protection and direction in the execution of the trust and the decree, is a final decree, from which an appeal will lie. *Marshall, Davis & Co. v. McPhillips*, 145.
4. *Consent decree against married woman*.—In the absence of fraud in its procurement, or other special cause shown, a consent decree is as binding on a married woman as on a person *sui juris*. *Winter v. City Council*, 481.
5. *Conclusiveness of former decisions*.—This will having been before this court in two former cases, which involved the same lands now in controversy, and in which the devise to the second son was sustained; the defendants in this case having bought on the faith of those decisions, and paid full value for the property; the court adheres to those decisions, as settling a rule of property for this particular case, although the plaintiff, daughter and sole surviving child of the oldest son, is not concluded by them as *res judicata*, and is not barred by the statute of limitations, and although those cases are hereby overruled on principle. *Bibb v. Bibb*, 437.

JURORS AND JURY. See CRIMINAL LAW, 15, 54-5.

JUSTICE OF THE PEACEs See ATTACHMENT, 2-4.

## LANDLORD AND TENANT.

1. *Landlord's statutory lien; attaches when*.—The lien given by statute to a landlord, or his assignee, on the crops grown on the leased premises, for the rent of the current year (Code, § 3467) only attaches when the relation of landlord and tenant exists between the parties. *Hardin v. Pulley*, 381.
2. *Landlord and tenant; when relation exists*.—While the relation of

LANDLORD AND TENANT—*Continued.*

landlord and tenant may be created by express contract, or by the conduct of the parties towards each other, it will not be inferred from the mere fact of occupation only, when the relative position of the parties to each other, in the particular case, can be referred to any other distinct cause. *Ib.* 381.

3. *Same ; as between infant devisees and paternal trustee.*—Where lands are devised to infant children, their father being appointed executor and trustee, with power to manage and control the property for them; whatever may be his liability to them in a proper proceeding, for rents and profits, the relation of landlord and tenant does not exist between them, and they have no statutory lien on the crops raised by him on the lands, and received and sold by his administrator. *Ib.* 381.
4. *Affidavit as to removal of crop.*—An affidavit for an attachment at the suit of the landlord, on the ground that a part of the crop has been removed without his knowledge or consent (Code, § 3472, subd. 2), must allege that it was removed from the rented premises, or it is substantially defective. *Knowles v. Steed*, 427.
5. *When action lies in favor of landlord.*—A landlord, having a statutory lien on his tenant's crop for the rent of the land, may maintain an action for money had and received, against a purchaser who, having notice of the lien, receives and sells the crop. *Thornton v. Strauss & Steinhardt*, 164.
6. *Agreement to pay rent, in default of paying purchase-money.*—Where lands have been sold and conveyed, a mortgage being taken to secure the balance of the purchase-money unpaid, a subsequent agreement between the parties, reduced to writing, by which the purchasers bind themselves, in the event of their failure to pay the balance of the purchase-money as stipulated, to deliver three bales of cotton as rent, creates the relation of landlord and tenant between them, with its attendant rights and incidents. *Ib.* 164.
7. *Assignment of mortgage and purchaser's note, after maturity of rent-obligation.*—An assignment by the vendor, after the maturity of the purchaser's obligation to pay rent, of the mortgage and secured note for the unpaid purchase-money, does not carry with it, as an incident, the right to the rent then past-due, nor take away the vendor's right of action as landlord; but, if it were shown that the purchase-money had been paid in full to the assignee, under a redemption or foreclosure of the mortgage, this would be a complete defense to a subsequent action by the vendor, founded on the rent-contract, or on his lien as landlord. *Ib.* 164.
8. *Damages as between lessor and lessee.*—As between lessor and lessee, where the latter sues for the breach of an express stipulation to put him in possession, the general rule must govern, though the lessor was guilty of no fraud or wrongful conduct; and the measure of damages is, not the consideration paid, with interest, but the value of the lease. *Snodgrass v. Reynolds*, 452.
9. *Same ; proof of value of crops.*—The leased premises consisting of a meadow of about thirty acres, sown in "Johnson grass," a crop of which was then ready to be mowed, the plaintiff may prove how many crops the land would produce each year with ordinary seasons, and the probable quantity and market value of each crop; not as a basis for the recovery of profits as such, but as facts to be considered by the jury in estimating the value of the use of the land during the term—that is, the value of the lease. *Ib.* 452.
10. *Trespass on leased premises by stranger.*—When the possession of the leased premises is open and unobstructed at the time of the



LANDLORD AND TENANT—*Continued.*

renting, and there is only an implied covenant on the part of the lessor that they shall be open to entry, a subsequent trespass or intrusion by a third person is a wrong against the lessee; but, if there is an express stipulation by the lessor to put the lessee in possession, such subsequent trespass, before the lessee has entered, is a wrong against the lessor. *Ib.* 452.

## LANDS.

1. *Uninclosed lands; cattle running at large.*—In this State, except where the rule is changed by local statutes, uninclosed lands are regarded as common of pasturage, over which cattle or stock may be suffered to run at large; and if the owner of the land desires to protect himself against damage, he must erect and maintain a lawful fence around them. *Wilhite v. Speakman*, 400.
2. *Sale of sixteenth-section lands; title of purchaser.*—A certificate for the purchase of lands belonging to the sixteenth section (Code, § 988) conveys the legal title to the purchaser, subject to be defeated on the happening of any of the contingencies which, by the terms of the statute, cause a forfeiture and reversion to the State. *Watson v. Prestwood & Fletcher*, 416.
3. *Railroad lands, under grant by Congress; sale by railroad company, or its agent; limitation of action.* *Ware v. Swann & Billups*, 330.

## LEGACY AND DEVISE.

1. *Devise of estate for life, without liability to account, and with general power of disposition.*—A devise and bequest of an express estate for life, with general power of disposition, and without liability to account, followed by a devise over of what may remain unused and undisposed of, vests in the first taker an absolute estate in fee simple. *Bolman v. Lohman*, 63.
2. *Bequest to county, in trust for preservation of private burial-place.* Neither the county as a corporation, nor the court of county commissioners, has power to take a bequest in perpetuity, in trust to lend or invest the money, and to appropriate the annual interest to the repair and preservation of the private burial-ground of the testatrix and her family. *Holifield v. Robinson*, 419.
3. *Bequest in perpetuity, in trust for preservation of private burying-ground.*—A bequest of money to county commissioners, "and their successors in office, or to such authority as may control and direct the finances of said county, to be held in perpetuity in trust," and the interest to be expended annually in the repair, preservation and neat keeping of the graves and monuments of the testatrix and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and is void. *Johnson v. Holifield*, 423.
4. *Devise to oldest son and his male issue, and, on default to such issue, then to second son and his male issue.*—Under the statute which was of force in 1840, converting an estate in fee tail into an estate in fee simple in the first taker (Clay's Digest, 157, § 37), if lands were devised to the testator's oldest son and his lawful male issue, and in case he should die leaving no lawful male issue, or the same shall become extinct before he or they arrive at the age of twenty-one years, and likewise leaving no male issue, then to the next younger son and his lawful male issue, the oldest son took an absolute estate in fee simple. (Overruling *Edwards v. Bibb*, 43 Ala. 666, and 54 Ala. 475.) *Bibb v. Bibb*, 437.
5. *Same; conclusiveness of former decisions.*—This will having been before this court in the two cases above cited, which involved the

LEGACY AND DEVISE—*Continued.*

same lands now in controversy, and in which the devise to the second son was sustained; the defendants in this case having bought on the faith of those decisions, and paid full value for the property; the court adheres to those decisions, as settling a rule of property for this particular case, although the plaintiff, daughter and sole surviving child of the oldest son, is not concluded by them as *res judicata*, and is not barred by the statute of limitations. *Ib.* 437.

## LIBEL.

1. *When action lies.*—To support an action for libel, when the complaint alleges no special damage, the publication must be libellous *per se*—must charge an indictable offense, or must tend to subject the plaintiff to public hatred, contempt, or ridicule, or to exclude him from association with virtuous and honorable men. *Trimble v. Anderson*, 514.
2. *Same.*—A notice published in a newspaper, warning all persons against trading for two notes, alleging that the plaintiff had obtained them, without consideration, from a person whose mental condition at the time was such as incapacitated him for business, is not libellous *per se*; for he might have procured them by gift, and without any knowledge or suspicion of the donor's mental incapacity. *Ib.* 514.
3. *Demurrer.*—Whether the publication, as set out in the complaint, is libellous *per se*, is properly determined by the court on demurrer, notwithstanding the averment that it was made falsely, maliciously, and with the intent to defame plaintiff. *Ib.* 514.

## LIEN.

1. *Of common carrier*; waiver of. *L. & N. Railroad Co. v. McGuire & Co.*, 395.
2. *Of creditor's bill*; as against claim of homestead exemption. *Hines v. Duncan*, 112.
3. *Of mechanics and contractors.* See MECHANIC'S LIEN.
4. *Statutory's lien of tax-collector's official bond*; how enforced in equity. *Lott v. Mobile County*, 69.
5. *Lien for taxes*; legal and equitable remedies. *Winter v. City Council*, 481.

## LIMITATIONS, STATUTE OF.

1. *Limitation of action to recover lands sold for taxes.*—Five years is the statutory limitation of an action to recover lands sold for the non-payment of taxes (Code, § 464), and this has been judicially construed to mean five years from the delivery and registration of the deed, properly executed and acknowledged. *Hughes v. Anderson*, 209.
2. *Same.*—The limitation of five years, prescribed as a bar to actions for the recovery of lands sold for delinquent taxes (Code, § 464), does not begin to run until the deed to the purchaser is properly recorded. *Bolling v. Smith*, 535.
3. *Action for railroad lands.*—The title to the lands embraced in the grant by Congress to the State of Alabama, for the benefit of certain railroads (11 U. S. Stat. at large, p. 17), was vested in the State as trustee, until the completion of the road, except as to the lands embraced in the first continuous length of twenty miles, which might be sold at an earlier day; and the statute of limitations not running against the State while the lands were so held, it did not begin to run against the railroad company until, by the

LIMITATIONS, STATUTE OF—*Continued.*

- completion of the road, it acquired the right to sue. *Ware v. Swann & Billups*, 330.
4. As to the limitations barring criminal prosecutions, see CRIMINAL LAW, 59, 60.
  5. As to the limitation of a bill to redeem by a mortgagor, see CHANCERY, 17, 18.

## MALICIOUS PROSECUTION.

1. *When action lies.*—To sustain an action for a malicious prosecution, the prosecution must have been instituted, not only maliciously, but without probable cause; though the party was acquitted, it does not necessarily follow that the prosecution was malicious, nor that it was instituted without probable cause; and while malice may be inferred from the want of probable cause, the want of probable cause can not be implied from malice the most express. *Steed v. Knowles*, 446.
2. *Probable cause.*—Probable cause, as used in this connection, involves not only an honest belief on the part of the prosecutor, but a belief based on reasonable grounds, and not upon the caprice, prejudice, or idle dreams of the prosecutor. *Ib.* 446.
3. *Advice of counsel.*—That the prosecution was instituted by the advice of counsel, given on a full and fair statement by the prosecutor of all the facts known to him, or which by proper diligence he could have ascertained, is a full defense to the action, though the advice was erroneous, or was not warranted by the facts stated; but, if the prosecutor failed to disclose any material fact known to him, he can not shelter himself behind the advice of counsel founded on a partial statement. *Ib.* 446.
4. *Construction and effect of record; charge submitting legal question to jury.*—It is the province and duty of the court to construe the record showing the prosecution and its termination, and its legal effect should not be submitted to the determination of the jury. *Ib.* 446.

## MANDAMUS.

1. *Lies when.*—If the chancellor improperly refuses to enter up an award as the judgment and decree of the court, *mandamus* lies to compel him.—*Dudley v. Farris & McCurdy*, 187.

## MECHANIC'S LIEN.

1. *Material-man as original contractor; time of filing claim.*—A person who furnishes materials for a planing-mill, under a contract with the owner of the property, is an original contractor (Code, §§ 3440-44), and may file his claim of lien at any time within six months after his indebtedness has accrued. *Lane & Bodley Co. v. Jones*, 156.
2. *Description of premises sought to be charged, in claim filed, and in complaint.*—When the claim of lien as filed for record, and the complaint, each describes with sufficient certainty the lot on which is situated the building or erection sought to be charged, it is no objection that a lien is also asserted and claimed on "the wharf and water privileges in front." *Ib.* 156.
3. *When claim of lien must be filed for record.*—When materials are furnished for the construction or repair of a building, under a "single continuing contract," the time within which the statement of claim must be filed for record begins to run from the delivery of the last items; but, when furnished under separate orders or requests, though in pursuance of a general agreement or



MECHANIC'S LIEN—*Continued.*

understanding to furnish, from time to time, such materials as may be needed, and as ordered, each order is a separate contract, and the statement must be filed within the prescribed time after each delivery. *Ib.* 156.

4. *Statement of account or claim as filed, without allowing credits.*—The claim of lien, as filed for record, is required to state a "just and true account of the demand due after all just credits have been given;" and the intentional omission of just and lawful credits, for the purpose of increasing the amount of the lien, is a fraud in law, which vitiates the entire lien as against the title of an assignee of the premises. *Ib.* 156.
5. *Waiver of lien by acceptance of note.*—The acceptance of the debtor's note is not a waiver of the contractor's statutory lien, unless it is received in payment of the debt, or unless the right of action is thereby postponed beyond the time prescribed by the statute for the enforcement of the lien; but the plaintiff can not maintain an action to enforce his statutory lien, without producing and surrendering the note, or satisfactorily accounting for its absence. *Ib.* 156.
6. *Joinder of common counts with special count to enforce lien.*—The common counts may be united with a special count seeking to enforce the statutory lien of a mechanic or material-man (Code, §§ 3440-61); and the plaintiff may have a personal judgment, though he fails to establish his lien. *Bedsole v. Peters*, 133.
7. *Description of premises sought to be charged, in claim filed, and in complaint.*—When the plaintiff seeks to enforce a lien, not only on the structure and improvements erected or made, but also on "one acre" of the land on which they are situated, the verified statement of his claim, as filed of record, and the complaint, must each describe the "one acre" with reasonable and convenient certainty, so that it may be identified and separated from the residue of the tract (Code, § 3444); but, though this description be indefinite and insufficient, whereby the lien fails as to the land, it may nevertheless be established and enforced against the structure and improvements. *Ib.* 133.
8. *Sufficiency of verdict.*—The complaint containing the common counts and a special count, in which the structure and improvements sought to be charged are described with sufficient certainty; and issue being joined on the pleas of payment and set-off, with the general issue; a verdict finding "the issues in favor of the plaintiff, \$100," though informal, is sufficient to support a judgment declaring a lien in his favor, for that sum, on the structure and improvements. *Ib.* 133.

MERGER. See MORTGAGES, 5, 6.

## MORTGAGES.

1. *Rents, as between mortgagor and mortgagee.*—When a mortgagor is in possession, before default, he is not the tenant of the mortgagee, nor liable for rent, in the absence of a stipulation to the contrary in the mortgage; but, after default, or the happening of other contingency specified, the legal title and estate being vested in the mortgagee, he may make entry, or require the mortgagor to pay rent; and if he suffers the mortgagor to continue in possession, on his promise to pay rent, the relation of landlord and tenant, with all its rights and incidents, is thereby created between them. *Strauss & Steinhart v. Harrison*, 324.
2. *Rents and profits, against mortgagee in possession.*—On statement of the account between mortgagor and mortgagee, under a bill to

MORTGAGES—*Continued.*

redeem, a mortgagee in possession will only be charged with rents actually received, unless he has been guilty of willful default, or gross negligence; and the rents must be estimated on the value of the property when he took possession, without regard to permanent improvements afterwards erected by him. *Gresham v. Ware, 192.*

3. *Compensation for permanent improvements.*—A *bona fide* occupant under claim of title, who erects permanent and valuable improvements, is entitled to compensation, at least as a set-off against mesne profits; but knowledge, or notice of adversary rights, is fatal to the claim for compensation; and a mortgagee who repudiates the relation, or a purchaser from him with notice, is regarded as a wrong-doer, and is not entitled to compensation. *Ib. 192.*
4. *Redemption by mortgagor as surety; prior application of property of co-mortgagor as principal.*—When the principal and his surety jointly execute a mortgage to the creditor, conveying lands which belong to them separately, the surety has an equity to require that the lands of the principal shall be first sold and applied to the satisfaction of the debt; and he may, after default, maintain a bill to redeem his land, asking a foreclosure as to the property of the principal, and offering to pay the balance that may remain due. *Ib. 192.*
5. *Merger of legal and equitable estates in mortgagee, by purchase of equity of redemption; intervening equity of surety.*—As a general rule, when the legal and the equitable titles become united in the mortgagee, the mortgage is merged in the unity of possession; but there is no merger, when it is to the interest of the mortgagee that the titles be kept distinct, nor when there is an intervening right in a third person; and when the mortgagee purchases the principal's equity of redemption, without the consent of the surety, the equity of the latter to have the property of the principal first applied to the payment of the common debt will prevent a merger. *Ib. 192.*
6. *Same.*—If the purchase of the principal's equity of redemption is made with the consent of the surety, but under an agreement by the mortgagee to take possession, account for the rent, and sell under the power contained in the mortgage, but with a modification of the prescribed terms, there is no merger, and the equity of the surety remains unimpaired; nor can the terms of this agreement be changed, to his prejudice, by a subsequent agreement between the principal and the creditor, to which he is not a party. *Ib. 192.*
7. *Description of property conveyed; parol evidence in aid of.*—A mortgage of "my entire crop of cotton and corn" is not void for indefiniteness and uncertainty, but the general descriptive words may be made definite and certain by parol evidence showing that the parties had reference to the crop to be raised by the mortgagor on the plantation in the county which he was then cultivating. *Smith v. Fields, 335.*
8. *Registration as constructive notice; liability of purchaser to mortgagee.*—A mortgage of crops not yet planted, if duly recorded in the county in which the lands lie, is constructive notice to a purchaser of the crops after they have been gathered; and he is liable to the mortgagee in trover, or a special action on the case. *Ib. 335.*
9. *Purchase by mortgagee, at sale under mortgage; limitation of bill to set aside.*—When a mortgagee becomes the purchaser at his own sale under a power in the mortgage, a bill to set aside the sale, and for a redemption and account, filed nine years and ten months

MORTGAGES—*Continued.*

- after the sale, comes too late; and an alleged offer to account by the mortgagee, made two years after the sale, if it can have the effect to keep the mortgage account open, does not obviate the lapse of time. *Sanders v. Askew*, 433.
10. *Same*.—If the sale was made without giving notice as required by the terms of the mortgage, it is void, and the legal relation between the parties remains unchanged; and a bill to redeem would not be barred until the lapse of ten years from the surrender of possession. *Ib.* 433.
  11. *Mortgage of wife's property*.—As to property belonging to the equitable estate of a married woman, she is regarded as a *femme sole*, and may mortgage it for her own debt, or for the debt of her husband; but a mortgage of property belonging to her statutory estate, executed by her and her husband jointly, to secure her own debt or her husband's, is absolutely void, and creates no lien on the property. *Steed v. Knowles*, 446.
  12. *Mortgage of mill property and machinery; destruction by fire, and lien on remaining machinery*.—Under a mortgage of a half interest in certain mill property and machinery, which is afterwards destroyed by fire, though the remaining machinery is thereby dis-severed from the freehold, and converted into personal chattels, the lien of the mortgage on it is not discharged or impaired. *Ib.* 446.
  13. *Mortgage held satisfied, and sale under power enjoined*.—On consideration of the voluminous testimony contained in the record in this case, which is conflicting and irreconcilable, and applying to it the settled rule which governs this court in revising the chancellor's decision on disputed questions of fact, the court is satisfied that the chancellor erred in his decree, and that the mortgage was in fact satisfied; and therefore reverses the chancellor's decree, and here renders a decree perpetuating the injunction against the sale under the mortgage, and ordering satisfaction to be entered of record as prayed. *Gilmer v. Wallace*, 464.
  14. *When mortgagee, or assignee, is not purchaser for valuable consideration*.—When a mortgage is given merely as security for a pre-existing debt, no new consideration entering into the transaction, the mortgagee is not entitled to protection against an outstanding equity of which he had no notice, as a purchaser for valuable consideration; and if he transfers his interest as collateral security for an existing debt, without any new consideration, his assignee is not a purchaser for value. *Banks v. Long*, 319.
  15. *Mortgage construed, as to default and forfeiture*.—A mortgage which purports to be given as security for money loaned, made payable "on demand" by a printed clause, and on the further condition, expressed in writing, that the interest shall be paid semi-annually, and, on failure to pay the same, that the mortgage may be foreclosed for both principal and interest; and by which it is further provided, that the money loaned shall, on the death of the mortgagee, belong to the mortgagor if living, or to her surviving children in the event of her death before that time, and that the mortgage shall then be null and void,—does not contemplate or authorize foreclosure as to the principal, so long as the interest is paid as stipulated; and when diligent effort to pay promptly is shown, whether intentionally prevented by the act of the mortgagee, or defeated by unavoidable causes, a default and consequent forfeiture can not be claimed. *Bolman v. Lohman*, 63.
  16. *Rights of tenant for life and remainder-men, on foreclosure of mortgage securing fund*.—On the foreclosure of a mortgage given to secure the payment of money loaned, when the mortgagee is only



MORTGAGES—*Continued.*

entitled to the interest during life, with remainder over on her death, the money should be paid into court, and so secured as to protect the rights of the remainder-men, while providing for the payment of the interest to the mortgagee. *Ib.* 63.

17. *Usury as defense to bill for foreclosure.*—Usury in the transaction may be set up in defense of a bill to foreclose a mortgage, filed by an assignee, unless the mortgagor has estopped himself from setting up that defense against the assignee; and the defense being established, the complainant can recover no interest. *Van Beil v. Fordney*, 76.
18. *Usury in mortgage; estoppel by admission in answer.*—If a mortgagee, in his answer to a bill to redeem, admits the charge of usury, he is estopped from adducing evidence to the contrary; and he can only be allowed legal interest from the date of the loan. *Gresham v. Ware*, 192.

## NEGLIGENCE.

1. *Contributory negligence; burden of proof as to.*—Contributory negligence is a defense, the burden of proving which rests on the defendant, although it may be negated by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. *M. & E. Railway Co. v. Chambers & Abercrombie*, 338.
2. *Collision of moving train with cars on side-track; contributory negligence, as affected by speed of train and location of cars.*—In an action by a railroad company, to recover damages on account of injuries caused by a collision of one of its trains with several empty cars left standing on a side-track by the defendants' servants, if the empty cars were left standing too near the main track, but a collision might, nevertheless, have been avoided by the use of reasonable diligence on the part of the persons who were in charge of the passing train, the defense of contributory negligence would be made out; and in this connection, the speed of the train, and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material facts. But, if the empty cars were not placed too near the main track, but were insecurely scotched on the down grade of the side-track, and, being put in motion by the passing train, rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff. *Ib.* 338.
3. *Contributory negligence in construction of side-track.*—In such action, a plea averring contributory negligence by plaintiff, in that "said side-track was constructed by plaintiff in an unskillful and improper manner," is demurrable, since such negligence would be too remote from the injury. *Ib.* 338.
4. *Honest mistake as defense.*—If the empty cars were placed by the defendant's servants so near the main track of the plaintiff's road as not to allow room for passing trains, the defendants can not claim immunity from liability, on the ground that this was the result of an honest mistake on the part of their servants. *Ib.* 338.
5. *Liability of master for negligence of servants.*—A gas company having exclusive possession and control of the side-track of a railroad adjacent to its works, for the receipt and delivery of coal, and having employed an adjoining proprietor to unload the coal delivered on a train of cars; if the cars, when unloaded, are negligently placed or left by said proprietor's servants so near the main track of the road as to cause a collision with a passing train,

NEGLIGENCE—*Continued.*

- he and his employer, the gas company, are jointly liable to the railroad company for the damages thereby caused. *Ib.* 338.
6. *Statutory liability of railroad company, for injuries to cattle ; burden of proof.*—Under statutory provisions (Code, §§ 1699, 1700), the failure of a railroad engineer to comply with statutory requirements is negligence *per se*, and renders the railroad company liable for all damages resulting from such failure; and in an action to recover damages for cattle killed or injured, the *onus* is on the railroad company to prove a compliance with all statutory requirements. *Railroad Co. v. Deaver*, 216.
  7. *Statutory duty of engineer at public road crossing.*—A railroad engineer is required to “blow the whistle, or ring the bell, at least one-fourth of a mile before reaching any public road crossing, . . . and continue to blow such whistle, or ring such bell, at intervals, until he passes such road crossing” (Code, § 1699); but, while a charge is erroneous which makes it his duty to blow the whistle, omitting the alternative (as to ringing the bell), the error is without injury to the defendant, when it appears that the bell was not rung at any time. *Ib.* 216.
  8. *Same ; speed of train, by statute, and at common law.*—The engineer is also required, “before entering any curve crossed by a public road on a cut, where he can not see at least one-fourth of a mile ahead,” to reduce the speed of his train, and “approach and pass such crossing in such cut at such moderate speed as to prevent accident in the event of an obstruction at the crossing” (Code, § 1699); but the statute only applies to such crossings as are particularly described, and leaves his duty at other crossings to be determined by the common law. *Ib.* 216.
  9. *Same.*—In cases not governed by statutory regulations, the rate of speed at which a train of cars may approach and pass a public road crossing is not governed by any fixed and definite rule, but is somewhat dependent on the locality and the attendant circumstances; and a charge is erroneous which makes it the duty of the engineer, on approaching a crossing, to diminish the speed of his train, without regard to the attendant circumstances. *Ib.* 216.
  10. *Diligence required in case of obstructions on road.*—An engineer is also required, “on perceiving any obstruction on the track of the road,” to “use all means within his power, known to skillful engineers, in order to stop the train;” but this duty is not absolute, and does not require that the peril of passengers shall be increased, when the obstruction is not perceived until too late to stop the train with safety; though there may have been antecedent negligence, and consequent liability incurred, by the failure to keep a proper lookout, whereby the obstruction might have been sooner discovered. *Ib.* 216.
  11. *Negligence, as cause of action or defense.*—Negligence, whether as a cause of action or as a defense, must be the proximate cause of the injury complained of; and when contributory negligence is set up as a defense, it is an admission of negligence on the part of the defendant himself. *Carter v. Chambers*, 223.
  12. *Diligence in driving carriage.*—Diligence is a relative term, and has not always the same measure; and a charge which instructs the jury that, ordinarily, the law requires the same diligence from the driver of a carriage and a person on foot in a public street, is erroneous. *Ib.* 223.
  13. *Same.*—It cannot be asserted, as matter of law, that driving a carriage rapidly through a public street is, *per se*, culpable negligence. *Ib.* 223.

NONSUIT. See ERROR AND APPEAL, 5.

## OFFICERS.

1. *Officer de facto*.—An officer *de facto*, executing process placed in his hands, is entitled to the same protection that the law gives to an officer *de jure*; and a person who is indicted for resisting him, or escaping from him, can not be heard to question his appointment. *Floyd v. The State*, 39.

## OVERRULED CASES.

1. *Edwards v. Bibb*, 43 Ala. 666, and 54 Ala. 475, as to construction of devise, overruled by *Bibb v. Bibb*, 437.

## PARTNERSHIP.

1. *What constitutes partnership*.—When the lessee of land contracts in his own name, but one-half of the money paid in cash is furnished by a third person, under an agreement between them that he shall become a partner if the lessee acquires possession; this does not constitute a partnership between them, possession never having been obtained, and does not prevent the lessee from maintaining an action in his own name alone for a breach of the stipulation for possession. *Snodgrass v. Reynolds*, 452.
2. *Same*.—Where two persons are associated together in the sale of commercial fertilizers on commission, but the only interest one of them has in the business is the right to have such quantities as he may desire for his own use at a discount of the commissions from the selling price, this does not make them partners as between themselves; but, if they hold themselves out to the public as partners, they are liable as such to third persons dealing with them in ignorance of the real facts. *Ala. Fertilizer Co. v. Reynolds & Lee*, 497.
3. *Authority of partner to bind partnership*.—Each partner is the agent of the partnership, as to all contracts and transactions within the scope of the partnership business, as tested by the nature of the particular business and its ordinary usages. *Ib.* 497.
4. *Same; purchases on credit*.—When persons are engaged in the sale of merchandise as a business, purchases to keep up their stock are appropriate and necessary to the business, and such purchases are, as matter of common knowledge, made on credit, longer or shorter according to the usages of the particular business; and when a partnership is so engaged, each partner has the right to bind the other by such purchases on credit. *Ib.* 497.
5. *Same; same*.—In the case of commission-merchants, engaged only in the business of selling on commission for others, purchases on their own account being outside of the scope of that business, one partner can not bind the other by a purchase on credit in the partnership name. *Ib.* 497.
6. *Character of partnership business; how determined*.—Whether partners are engaged in business as merchants on their own account, or are selling on commission for others, is a question of fact, and is to be determined, not by any private agreement between themselves, but by the nature of the business actually done by them with the public. *Ib.* 497.
7. *Estoppel against denial of partnership*.—When a partnership has been engaged for two years, under the management of the active partner, in buying and selling on their own account, it is too late for the other partner to allege that their legitimate business was confined to selling on commission, and that the purchases were made without his knowledge or consent. *Ib.* 497.
8. *Voluntary charitable associations; jurisdiction of equity on ground of partnership*.—The jurisdiction of equity over such voluntary associations and their funds can not be sustained on the ground of



PARTNERSHIP—*Continued.*

partnership, since the members, whatever may be their relation or liability to third persons, are not partners *inter sese*; there is no mutual participation in profits or loss, no authority to bind or assign the common property, and no dissolution wrought by the death of a member. *Burke v. Roper*, 138.

9. *Rights of surviving partner.*—After the dissolution of a partnership by the death of one of the members, the survivor can not bind the estate of the deceased, by any note, acknowledgment, or admission, though he may bind himself individually, and thereby authorize a partnership creditor to pursue the partnership assets in his hands; and on a subsequent settlement by him with the personal representative of the deceased, it is incumbent on him to show that the debts, to the payment of which he applied the partnership assets, were the debts of the partnership. *Rose v. Gunn*, 411.
10. *Partnership creditor, proceeding against estate of deceased partner.* When a creditor seeks to subject the estate of a deceased partner to the payment of an alleged partnership debt, he must show that it was contracted by the partnership during its existence, and it is not sufficient to prove a written acknowledgment by the survivor, the institution of an action at law against him, and the recovery of a judgment against his personal representative. *Ib.* 411.
11. *Rights and remedies of partnership creditors.*—A partnership creditor, as such, has no lien on the partnership assets, though the lien of the surviving partner may, in a proper case, be made available in his favor; yet, if the surviving partner transfers the partnership effects to the personal representative of the deceased, in settlement of the partnership matters between them, this lien is extinguished, and there is none to which a partnership creditor can be subrogated. *Ib.* 411.
12. *Same.*—Although a partnership creditor has no remedy against the partnership effects in the hands of the personal representative and heirs of the deceased partner, to whom they have been transferred by the survivor; yet he may maintain an action at law against the personal representative, or a bill in equity to enforce payment out of the estate of the deceased partner. *Ib.* 411.
13. *Rights of surviving partner, in and to partnership property.*—On the dissolution of a partnership by the death of one of its two members, the surviving partner is entitled to the exclusive possession of the partnership property; but he holds the assets as a *quasi* trustee, first for the partnership creditors, and afterwards for the personal representative of the deceased partner; and while the courts will not interfere with his management, so long as he continues faithful to his trust, a court of equity will often intervene to afford relief against waste, negligence, misconduct, or other violation of duty on his part, prejudicial to the rights of the party complaining. *Farley, Spear & Co. v. Moog*, 148.
14. *Rights of partnership creditors, on dissolution of partnership, insolvency and misconduct of surviving partner.*—Strictly speaking, partnership creditors have no lien upon the partnership assets for the payment of their debts, though they are entitled to priority of payment over individual creditors; yet, where the surviving partner becomes insolvent, and his individual creditors levy attachments on the partnership property, the partnership creditors may come into equity to enforce their right to priority of payment out of the partnership assets. *Ib.* 148.
15. *Execution or attachment against individual partner, levied on partnership property.*—When an execution or attachment against an individual partner is levied on the partnership property, the pur-

PARTNERSHIP—*Continued.*

chaser at a sale under the levy acquires only that partner's interest in the assets which may remain after the partnership debts have been paid and the partnership affairs adjusted; and this can only be ascertained by an account in equity. *Ib.* 148.

16. *Exemptions to partners.*—Partners can not claim an individual exemption in the partnership property, during the continuance of the partnership; but, when one partner sells out his interest to the other, without reservation, the effects become the exclusive property of the purchaser, discharged from any lien on account of partnership debts, and he may claim an exemption in them, as against the partnership creditors, if the sale was fair and *bona fide*. *Levy & Co. v. Williams*, 171.
17. *Settlement of partnership accounts by survivor.*—When the surviving partner, having become administrator of the estate of the deceased, makes a settlement of the partnership accounts with the widow, represented by an attorney who has been appointed guardian *ad litem* for the infant distributees; such settlement is not binding on the estate, and is no bar to a bill in equity to compel a settlement. *Vincent v. Martin*, 540.
18. *Continuation of partnership, under articles, after death of one partner.*—A stipulation in articles of partnership, that if either of the partners should die before the expiration of the stipulated period, "the surviving partner shall continue the business for the unexpired term," gives the survivor the power to employ all the partnership effects, without material change in the business, for the residue of the term; but confers on him no authority to fasten any new debt or liability on the estate of the deceased partner. *Ib.* 540.
19. *Sale of decedent's lands, for equitable division; jurisdiction of court, when lands were owned by partnership.*—Under its statutory jurisdiction to order a sale of a decedent's lands, when the same can not be equitably divided among the heirs and devisees (Code, § 2449), the Probate Court has no power to order the sale of a deceased partner's interest in partnership lands, before the partnership debts have been paid, and the accounts between the partners settled and adjusted; and the fact that the surviving partner makes the application, as administrator of the estate of the deceased partner, does not affect the principle. *Roulston v. Washington*, 529.

## PAYMENT.

1. *Acceptance of note; when operates as payment.*—The acceptance of a debtor's promissory note does not operate as payment of an antecedent debt, unless it is so received by agreement, express or implied; but the right of action is suspended until the maturity of the note. *Lane & Bodley Co. v. Jones*, 156.
2. *Application of payments.*—When the debtor does not direct, and the creditor does not make, a special application of a payment at the time it is made, but it is entered as a general credit on general account, the creditor can not afterwards make a special application to serve his interests as subsequently developed. *Ib.* 156.
3. *Acceptance of note in payment of antecedent debt.*—When a creditor takes the note of his debtor, with accommodation indorsements, in payment of an antecedent debt, he is a purchaser for value, in due course of business, equally as if he had advanced money on the faith of it; but the rule is different when such note is taken as collateral security for an antecedent debt. *Marks v. First Nat. Bank*, 550.
4. *Election of remedies in case of wrongful payment.*—When a party

PAYMENT—*Continued.*

has a right to elect whether he will ratify or disaffirm a wrongful payment, he must either ratify or disaffirm it as an entirety; and he can not, while suing the original debtor, maintain an action against the person to whom the money was paid, or fasten a trust on the property received by him in payment. But, if the property was merely received as collateral security for the debt, he may pursue it in equity, and at the same time maintain an action at law against the debtor; and the holder of a bill of exchange, to whom it has been transferred as collateral security by the payee, does not forfeit his right of action against the other parties, by an unsuccessful suit against one. *Williams, Deacon & Co. v. Jones*, 119.

5. *Extinguishment of debt, by appointment of debtor as administrator of creditor's estate.*—When the executor of a deceased creditor recovers a judgment against the debtor, and the latter becomes his successor in the administration, the judgment is extinguished by operation of law, the duty to pay and the right to receive being united in the same person. *Lane v. Westmoreland*, 372.

## PLEADING AND PRACTICE.

1. *Action on bond; who are proper parties defendant; amendment striking out defendant improperly joined, or discontinuance.*—On the death of one of several joint obligors, the remedy for a breach necessarily becomes several, in the absence of a statute authorizing a joint action against the survivors and the personal representative of the deceased; but, if the personal representative of the deceased is improperly joined as a defendant with the survivors, his name may be struck out by amendment, or a discontinuance entered as to him, without thereby discontinuing the action as against the others. *Reed v. Summers*, 522.
2. *Count construed as in assumpsit, and not in case.*—In an action brought by the State, against a person alleged to be indebted to it, a special count averring that a large sum of money was deposited in bank by a tax-collector to the credit of the State treasurer, and was used by the treasurer in the purchase of a check on New York, payable to himself as treasurer; that this check was indorsed by him to the defendant, to whom he was indebted on account of private transactions in the purchase and sale of cotton, and who knew that the same belonged to the State, and was applied by the defendant as a payment on said private indebtedness; and that neither the defendant nor the treasurer have ever paid the money over to the State, but it was due and unpaid, is in *assumpsit*, and not in case.—*Wolffe v. The State*, 201.
3. *Joinder of common counts with special count to enforce lien.*—The common counts may be united with a special count seeking to enforce the statutory lien of a mechanic or material-man (Code, §§ 3440–61); and the plaintiff may have a personal judgment, though he fails to establish his lien. *Bedsole v. Peters*, 133.
4. *Sufficiency of complaint, in averment of time or number.*—When the plaintiff declares on a special count, although he might recover under the common counts, the material facts must be alleged with reasonable certainty of time; though it is not necessary to prove the precise time as alleged, unless it is matter of substance; and when an act is continuous in its nature, as extending through a given period of time, it is sufficient to state the period of its duration. *Shields v. Sheffield*, 91.
5. *Same; in action by tax-collector, for fees collected by successor.*—The plaintiff, a late tax-collector, suing his successor for fees collected for services rendered by plaintiff, and declaring in a special



PLEADING AND PRACTICE—*Continued.*

- count, must allege the year or years in which the services were rendered, or in which the moneys accrued to him; and also the number of notices served by him, for which he claims fees, or the number and names of delinquents; although a general averment would be sufficient, when necessary to prevent prolixity. *Ib.* 91.
6. *Action for damages; sufficiency of complaint.*—The complaint in this case, which sought to recover damages for personal injuries sustained by plaintiff while engaged in feeding a circular saw in the defendant's employment, and which is set out in the statement of facts, "is equally as full, explicit and direct, as the complaint in the case of *M. & O. Railroad Co. v. Thomas*, 42 Ala. 672," which was held sufficient on demurrer; and is not obnoxious to any of the grounds of demurrer specifically assigned. *Hall v. Posey*, 84.
  7. *Demurrer to complaint containing common counts, with defective special counts.*—When the complaint contains special counts which are defective, and also the common counts, a demurrer to the entire complaint can not be sustained. *Tabler, Crudup & Co. v. Sheffield Land, Iron & Coal Co.*, 377.
  8. *Demurrer to complaint, in action for libel.*—Whether the publication, as set out in the complaint, is libellous *per se*, is properly determined by the court on demurrer, notwithstanding the averment that it was made falsely, maliciously, and with the intent to defame plaintiff. *Trimble v. Anderson*, 514.
  9. *Waiver of demurrer.*—In a quasi criminal prosecution for the violation of a municipal ordinance, removed by appeal into the Circuit Court, if a demurrer is interposed to the statement (or complaint), and the plea of not guilty is afterwards filed, before any action of the court is had or invoked on the demurrer, this court will hold the demurrer to have been waived, and will not consider the sufficiency of the complaint as assailed by it. *Pitts v. District of Opelika*, 527.
  10. *Demurrer to special plea; error without injury in ruling on.*—Improperly sustaining a demurrer to a special plea is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but the principle does not apply to the erroneous overruling of a demurrer to a bad special plea, whereby the plaintiff is compelled to take issue on it. *M. & E. Railway Co. v. Chambers & Abercrombie*, 338.

## RAILROADS.

1. *Statutory provisions as to liability of railroad company for injuries to cattle.*—Sections 1704–09 of the Code of 1876, as to the liability of railroad corporations for damages on account of live-stock killed or injured, have been superseded and repealed by the later statute now embraced in sections 1710–15. *Railroad Co. v. Fullerton*, 298.
2. *Measure of damages against railroad company, for injuries to cattle.* The measure of the plaintiff's damages, in an action against a railroad company on account of cattle killed, is not necessarily the value of the animal when alive, but the difference in value between the living animal and the dead carcass; and though he may abandon the carcass, when comparatively worthless, and recover the full value of the living animal, yet, if he converts it to his own use, or otherwise disposes of it, or if he might realize appreciable value for it by the exercise of reasonable diligence, the net amount of such value must be deducted. *Ib.* 298.
3. *Same; interest.*—The plaintiff should be allowed interest on the

RAILROADS—*Continued.*

- amount of his damages, not from the commencement of his action, but from the time the injury was done. *Ib.* 298.
4. *Duty of railroad company, as to condition of track and approaches thereto.*—A railroad company is required to keep its track and the approaches thereto, at public crossings, in good repair; but, with this exception, the track is private property, and its use by private persons is governed by the same principles which apply to the property of private persons. *Pratt Coal & Iron Co. v. Davis*, 308.
  5. *Same; liability for injuries to horse at crossing.*—A railroad company is not liable for injuries to a horse caused by its foot being caught between a projecting spike and one of the iron rails of the track, at a private crossing erected by third persons, which is not shown to have been serviceable to it in any way. *Ib.* 308.
  6. *Damages to passenger carried beyond his destination on railroad.*—In an action against a railroad company as a common carrier, by a passenger who was carried beyond his destination, the plaintiff is entitled to recover damages for his trouble and inconvenience in getting back to his destination. *Railroad Co. v. Lockhart*, 315.
  7. *Same; fright and consequent injuries.*—The plaintiff, who was a young girl about eight years of age, being carried about one mile beyond her destination, and put off at a place with which she was not familiar, would naturally be frightened by her condition and surroundings, and attempt to walk rapidly along the track back to the station; and for damages resulting from these natural consequences of the defendant's wrongful act, a recovery may be had. *Ib.* 315.
  8. *Same; sickness as element of damage.*—Whether the plaintiff's aggravated sickness was a proximate consequence of the defendant's wrongful act, is a question of fact for the determination of the jury; and if so found by them, it is an element of the damages she is entitled to recover. *Ib.* 315.
  9. *Railroad corporation; power to acquire mineral lands.*—A railroad corporation can not, without an express grant of power, acquire or recover mineral interests in lands, since such property is neither necessary nor proper for carrying out the purposes of the corporation. *Wilks v. Railroad Co.*, 180.
  10. *Liability of railroad company for wrongful acts of agents or servants; vindictive damages.*—A railroad corporation is liable for all acts of wantonness, rudeness or force, done or caused to be done by its agents or servants, in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons. *L. & N. Railroad Co. v. Whitman*, 228.
  11. *Implied contract that passengers may alight at platform not owned by railroad company.*—If the trains of the defendant railroad company were accustomed to stop at the platform at which the plaintiff desired to alight, although it was neither constructed nor owned by the company, an implied contract that passengers might stop there may be raised. *Railroad Co. v. Johnston*, 436.
  12. *Variance; action for damages, by passenger against railroad company.* Under a complaint, in an action against a railroad company, which claims damages on account of the conductor's refusal to stop his train and put plaintiff off at the proper station, alleging that he "willfully refused" to stop, and carried her several hundred yards beyond, "without her consent, and against her protest;" if the evidence shows that the conductor only neglected to stop, and that the plaintiff not only submitted, but consented to alight

RAILROADS—*Continued.*

- at the further place, without objection or protest, there is a fatal variance between the averments and the proof. *Ib.* 436.
13. *Statutory liability of railroad company, for injuries to cattle ; burden of proof.*—Under statutory provisions (Code, §§ 1699, 1700), the failure of a railroad engineer to comply with statutory requirements is negligence *per se*, and renders the railroad company liable for all damages resulting from such failure; and in an action to recover damages for cattle killed or injured, the *onus* is on the railroad company to prove a compliance with all statutory requirements. *Railroad Co. v. Deaver*, 216.
  14. *Statutory duty of engineer at public road crossing.*—A railroad engineer is required to “blow the whistle, or ring the bell, at least one-fourth of a mile before reaching any public road crossing, . . . and continue to blow such whistle, or ring such bell, at intervals, until he passes such road crossing” (Code, § 1699); but, while a charge is erroneous which makes it his duty to blow the whistle, omitting the alternative (as to ringing the bell), the error is without injury to the defendant, when it appears that the bell was not rung at any time. *Ib.* 216.
  15. *Same ; speed of train, by statute, and at common law.*—The engineer is also required, “before entering any curve crossed by a public road on a cut, where he can not see at least one-fourth of a mile ahead,” to reduce the speed of his train, and “approach and pass such crossing in such cut at such moderate speed as to prevent accident in the event of an obstruction at the crossing” (Code, § 1699); but the statute only applies to such crossings as are particularly described, and leaves his duty at other crossings to be determined by the common law. *Ib.* 216.
  16. *Same.*—In cases not governed by statutory regulations, the rate of speed at which a train of cars may approach and pass a public road crossing is not governed by any fixed and definite rule, but is somewhat dependent on the locality and the attendant circumstances; and a charge is erroneous which makes it the duty of the engineer, on approaching a crossing, to diminish the speed of his train, without regard to the attendant circumstances. *Ib.* 216.
  17. *Diligence required in case of obstructions on road.*—An engineer is also required, “on perceiving any obstruction on the track of the road,” to “use all means within his power, known to skillful engineers, in order to stop the train;” but this duty is not absolute, and does not require that the peril of passengers shall be increased, when the obstruction is not perceived until too late to stop the train with safety; though there may have been antecedent negligence, and consequent liability incurred, by the failure to keep a proper lookout, whereby the obstruction might have been sooner discovered. *Ib.* 216.
  18. *Consolidation of railroad companies ; provisions preserving rights and remedies of creditors, but authorizing sale of property by new company.*—By the 5th section of the act ratifying the consolidation of the Alabama and Florida Railroad Company and the Mobile and Great Northern Railroad Company, under the name of the Mobile and Montgomery Railroad Company, the new company was authorized to issue bonds, secured by mortgage or deed of trust “on the road, franchises and property of said company;” while the 6th section, after declaring that the consolidation “shall in no way affect the rights of the creditors of said [original] companies, and their separate existence shall be continued as to all the rights and remedies of creditors,” further provided, that the new company “may dispose of any property, real or personal, held by each of said [original] companies, and make and execute titles for



RAILROADS—*Continued.*

the same." *Held*, that this power of sale was confined to such property as was not needed for operating the road—surplus lands, and probably personal effects not in present use, nor required for use on the road—releasing such property only from the charge or incumbrance of existing debts, and permitting it to be utilized. *Spence v. M. & M. Railway Co.*, 576.

19. *State-indorsed railroad bonds; rights of purchasers, as against prior equity, or unrecorded mortgage.*—The bonds issued by the M. & M. Railway Company, under the authority of the act approved February 25th, 1870, and indorsed by the governor in the name of the State, purporting on their face to be first-mortgage bonds, and referring to the said statute, which required that the first million and a half of said bonds should be used only in purchase and exchange for the bonds of the M. & M. Railroad Company, to whose rights and property said M. & M. Railway Company had succeeded; but containing no reference to the act of August 5th, 1868, under which said M. & M. Railroad was incorporated, by the consolidation of the A. & F. Railroad Company and the M. & G. N. Railroad Company, nor to the charge and incumbrance thereby declared in favor of the creditors of said original companies; and being put on the market for sale, with the State's indorsement; a purchaser might well rely on their recitals, presume that all the requirements of the statute had been complied with, and claim protection against any prior lien or equity in favor of the State or said M. & M. Railway Company. But the acts of the officers and agents of the State, and of said railway company, could not affect the rights of the creditors of said original railroad companies, as preserved and secured by the terms of the consolidation, they not being parties to the chancery suit foreclosing the mortgage, under which said new railway company derived title; and the charge in favor of said creditors being expressly declared by said act of incorporation and consolidation, a purchaser of said new bonds is chargeable with notice of it, although a mortgage securing said debts, as recited in the agreement of consolidation, may never have been recorded, or in fact never existed. *Ib.* 576.
20. *State-indorsed railroad bonds, misapplied by railroad corporation; rights of holders.*—As held in this case on the former appeal (72 Ala. 566), the State-indorsed bonds of the New Orleans and Selma Railroad Company, issued to the company on the completion of the first twenty miles of its road, having been misapplied by it, in violation of the terms of the statute under which they were indorsed (Sess. Acts 1869–70, pp. 149–57), in payment of their debt to the contractor for work done in building said first twenty miles, the indorsement created no liability against the State, while the bonds remained in the hands of the contractor, or of any other person who was chargeable with notice of such misapplication; but, said bonds being negotiable instruments, and governed by the rules applicable to other negotiable paper, the State is liable, as an accommodation indorser, to any *bona fide* holder who acquired the bonds for value, in the usual course of business, without knowledge or notice, actual or constructive, of their original misapplication. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
21. *Same; who are purchasers for value, without notice.*—As to the bonds held by Gilman, Sons & Co. (58, of the 320 issued to the railroad company), and purchased by them from Crawford, to whom they were transferred by the contractor, the court holds, as on the former appeal (72 Ala. 566), that they are *bona fide* holders for value, without notice of the misapplication, although they

RAILROADS—*Continued.*

bought the bonds, at par, in exchange for the bonds of a private construction company which were worth only about ten cents on the dollar; but, as to the bonds held by Morton, Bliss & Co., which were transferred to them by the contractor, in payment for the iron sold by them to him (and used by him in the construction and equipment of said first twenty miles of road), that they are chargeable with notice of the misapplication, and can not be deemed innocent purchasers. *Ib.* 590.

22. *Same; right of holders under deed of trust.*—Of the holders of the 320 indorsed bonds issued by said railroad company, only those who are purchasers for value without notice are entitled to be subrogated to the statutory lien and priority of the State; but, as against the railroad company, which has waived the defense of a partial failure of consideration, and as against the complainant in the original bill, a subsequent judgment creditor of the railroad company, all are entitled to share in the security afforded by the deed of trust, and to have it enforced for their benefit. *Ib.* 590.
23. *Deed of railroad corporation, executed by agent; consideration.*—Held, re-affirming *Standifer v. Swann & Billups* (78 Ala. 88), that a conveyance of lands which belonged to the Alabama & Chattanooga Railroad Company, executed by J. C. Stanton as general superintendent and attorney in fact, without written authority from the board of directors, or other governing body of that corporation, passed no title or estate of which a court of law could take cognizance; that if the corporation be held to have ratified the act of such agent in making the sale and conveyance, by its knowledge of the facts and its failure to dissent, such ratification could only operate as an equitable estoppel, which is not cognizable at law; and that under the provisions of the act approved February 11th, 1870, authorizing the railroad company to sell a part of the lands, but requiring the proceeds of sale to be "appropriated to the payment of the first mortgage bonds of said company" (Sess. Acts 1869-70, p. 89, § 17), the lands could only be sold for money. *Ware v. Swann & Billups*, 330.
24. *Railroad lands; limitation of action for.*—The title to the lands embraced in the grant by Congress to the State of Alabama, for the benefit of certain railroads (11 U. S. Stat. at large, p. 17), was vested in the State as trustee, until the completion of the railroad, except as to the lands embraced in the first continuous length of twenty miles, which might be sold at an earlier day; and the statute of limitations not running against the State while the lands were so held, it did not begin to run against the railroad company until, by the completion of the road, it acquired the right to sue. *Ib.* 330.

## REDEMPTION OF REAL ESTATE.

1. *Bill to redeem; averment as to delivery of possession to purchaser.* When lands sold under execution are, at the time of the sale, in the possession of a tenant, to whom notice is given by the purchaser, and from whom he afterwards collects rents (Code, § 2878); these facts being averred in a bill to redeem by the judgment debtor, it is unnecessary that he should also aver that he delivered possession to the purchaser within ten days after the sale. *Richardson v. Dunn*, 167.
2. *Same; entire or partial redemption.*—Where several lots are included in one sale under execution, and the defendant has no title to one of them, he may maintain a bill to redeem the others, averring his want of title to the omitted lot, and tendering the entire amount due, without any deduction on account of it. *Ib.* 167.

REDEMPTION OF REAL ESTATE—*Continued.*

3. *Same; what are "lawful charges" to be tendered.*—The "lawful charges" which the judgment debtor, seeking to redeem, is required to pay or tender (Code, § 2879), include only claims and demands which are in the nature of a lien or incumbrance on the land; and neither insurance on buildings paid by the purchaser, nor a judgment rendered by a justice of the peace, unless an execution thereon has been levied on the land, is embraced in such lawful charges. *Ib.* 167.
4. *Same; tender of conveyance to be executed by purchaser.*—If an averment of a tender of a conveyance, to be executed by the purchaser, be necessary to the equity of a bill to redeem in any case, an averment that the defendant denies the complainant's right to redeem dispenses with its necessity, since it shows that such tender would be nugatory. *Ib.* 167.

## REMAINDERS.

1. *Rights of tenant for life and remainder-men, on foreclosure of mortgage securing fund.*—On the foreclosure of a mortgage given to secure the payment of money loaned, when the mortgagee is only entitled to the interest during life, with remainder over on her death, the money should be paid into court, and so secured as to protect the rights of the remainder-men, while providing for the payment of the interest to the mortgagee. *Bolman v. Lohman*, 63.

SET-OFF. See DAMAGES, 16.

SPECIFIC PERFORMANCE. See CHANCERY, 27-29.

## STATUTES.

1. *Construction of statute in favor of its constitutionality.*—When a statute is fairly susceptible of two constructions, one of which will uphold, and the other defeat its constitutionality, the former construction will be adopted, even though it be the less natural. *Quartlebaum v. The State*, 1.
2. *Proof of foreign statute.*—To render a book self-proving, and admissible as evidence of foreign statutes, public or private, or of legislative proceedings (Code, § 3045), it must appear to be published, not only "by authority," but by authority of the particular State, territory or government therein specified. *Edmunds v. The State*, 48.
3. *Repeal of penal statute or ordinance; effect on pending prosecution.* By statutory provision, a pending prosecution is not abated by the repeal of the statute on which it is founded, unless otherwise provided by the repealing statute (Code, § 4449); but this statute does not apply to municipal ordinances, and pending prosecutions under such ordinances are abated by their repeal, unless expressly excepted from the operation of the repealing ordinance. *Barton v. Gadsden*, 495.
4. *Constructive notice by public statute.*—The statute approved February 21st, 1870, under which railroad bonds were indorsed and provision made for their payment, and the repealing statute approved March 17, 1875, being public statutes, every purchaser and holder of the bonds is chargeable with knowledge of their provisions; and although the repealing statute may not amount to any open repudiation by the State of its liability as indorser (a point not decided), "it is sufficient to put a subsequent purchaser on inquiry, and to charge him with notice of the fact that there was something wrong about the bonds, especially when taken in connection with the other fact that, at the time of such repeal, the coupons for several years past due and unpaid were attached to them." *Morton & Bliss v. N. O. & S. Railroad Co.*, 592.



## SUMMARY PROCEEDINGS.

1. *Against defaulting county superintendent of education, and sureties on bond; joinder of administrator with survivors.*—On the death of a defaulting county superintendent of education, there is no statute which authorizes a joint action, or summary proceeding by notice and motion, against his personal representative and the sureties on his official bond; and if the personal representative is improperly joined as a defendant in such action or proceeding, his name may be struck out by amendment, or a discontinuance entered as to him. *Reed v. Summers, 522.*
2. *Same; lies when, and against whom.*—The statute which gives a summary proceeding, by notice and motion, in favor of a county superintendent of education, against his defaulting predecessor, "who has resigned, removed from the county, or been legally removed from office, or whose term of office has expired, and the sureties on his official bond, or any of them" (Code, § 3397, subd. 3), applies also where the defaulter dies before the expiration of his term of office, and authorizes a suit against the surviving sureties alone. *Ib. 522.*

## SURETIES.

1. *Surety's right to coerce indemnity.*—As a general rule, a surety or guarantor can not recover indemnity until he has been damnified—that is, until he has paid the debt; and even a payment, if made voluntarily and unnecessarily, neither increases nor accelerates his right to coerce indemnity. *Lane v. Westmoreland, 372.*
2. *Same.*—The defendant in a judgment at law, having created the debt for the joint benefit of himself and several other persons, from whom he took a mortgage, with power of sale, conditioned that he "should have said judgment to pay out of the proceeds of his own property;" and having afterwards become the administrator of the estate of the deceased creditor, whereby the debt was extinguished by operation of law, may then foreclose the mortgage, notwithstanding his voluntary act in taking on himself the administration of the creditor's estate. *Ib. 372.*
3. *Redemption by mortgagor as surety; prior application of property of co-mortgagor as principal.*—When the principal and his surety jointly execute a mortgage to the creditor, conveying lands which belong to them separately, the surety has an equity to require that the lands of the principal shall be first sold and applied to the satisfaction of the debt; and he may, after default, maintain a bill to redeem his land, asking a foreclosure as to the property of the principal, and offering to pay the balance that may remain due. *Gresham v. Ware, 192.*
4. *Merger of legal and equitable estates in mortgagee, by purchase of equity of redemption; intervening equity of surety.*—As a general rule, when the legal and the equitable titles become united in the mortgagee, the mortgage is merged in the unity of possession; but there is no merger, when it is to the interest of the mortgagee that the titles be kept distinct, nor when there is an intervening right in a third person; and when the mortgagee purchases the principal's equity of redemption, without the consent of the surety, the equity of the latter to have the property of the principal first applied to the payment of the common debt will prevent a merger. *Ib. 192.*
5. *Same.*—If the purchase of the principal's equity of redemption is made with the consent of the surety, but under an agreement by the mortgagee to take possession, account for the rent, and sell under the power contained in the mortgage, but with a modification of the prescribed terms, there is no merger, and the equity of

SURETIES—*Continued.*

the surety remains unimpaired; nor can the terms of this agreement be changed, to his prejudice, by a subsequent agreement between the principal and the creditor, to which he is not a party. *Ib.* 192.

6. *Conditional indorsements and signatures as sureties; difference between bonds and commercial paper.*—The principle which governs the liability of sureties on bonds conditionally delivered, as asserted in *Guild v. Thomas* (54 Ala. 474), and *Bibb v. Reid* (3 Ala. 88), has no application to commercial paper, in the hands of an innocent purchaser, who acquired it before maturity. *Marks v. First Nat. Bank*, 550.

## TAX-COLLECTOR.

1. *Enforcement of statutory lien against property of tax-collector and sureties.*—A court of equity will entertain jurisdiction of a bill in the name of the county, against a defaulting tax-collector and the sureties on his official bond, to enforce the lien declared by statute against their property. *Lott v. Mobile County*, 69.
2. *Same; averments of bill.*—Such a bill being supported by an independent equity, it is not necessary that it should aver that the accounts are complicated, nor that it should contain the averments necessary in a bill for discovery, or in a bill to surcharge and falsify a stated account. *Ib.* 69.
3. *When account becomes stated.*—A statement of his accounts by the tax-collector, prepared by him and submitted to the complainant, does not become a stated account, unless retained without objection within a reasonable time; and where it involves transactions extending through a period of nine years, and involving more than six hundred thousand dollars, its retention for thirty-five days before filing the bill is not unreasonable. *Ib.* 69.
4. *Authority to collect escaped taxes.*—It is the duty of the tax-collector to collect delinquent taxes for previous years remaining uncollected, for which no credit has been given on the allowance made for errors and insolvencies. *Ib.* 69.
5. *Non-joinder of sureties as parties.*—The tax-collector's bond being made joint and several by statute (Code, §§ 2905, 3754), it is not necessary that all of the sureties should be joined as defendants to the bill. *Ib.* 69.
6. *Statutory lien created by official bond.*—The lien declared by statute to be created by an official bond (Code, § 403), operates on property acquired by the principal after its execution, and on property acquired by the sureties after his default and before suit brought. *Ib.* 69.
7. *Fees of tax-collector for notices to delinquents.*—Under the provisions of the act incorporating the port of Mobile, and providing for the government thereof (Sess. Acts 1878-9, p. 406, § 24), the tax-collector is not entitled to any fee for making a personal demand on delinquent tax-payers, but only where, not being able to find delinquents, he leaves "written or printed notice at their place of residence;" and leaving such notice at any other place would not be sufficient, unless it is also shown that it was actually received by the delinquent. *Shields v. Sheffield*, 91.
8. *Action by tax-collector against his successor, for fees collected.*—A late tax-collector may maintain an action against his successor for fees collected, on proof that the defendant acted as his agent, express or implied, in collection of the fees; or, without such agency, on proof that he performed the services for which specified fees were given by law, complying with all the requisitions of the statute, and that the defendant collected the fees, *Ib.* 91.

TAX-COLLECTOR—*Continued.*

9. *Same; sufficiency of complaint.*—The plaintiff, a late tax-collector, suing his successor for fees collected for services rendered by plaintiff, and declaring in a special count, must allege the year or years in which the services were rendered, or in which the moneys accrued to him; and also the number of notices served by him, for which he claims fees, or the number and names of delinquents; although a general averment would be sufficient, when necessary to prevent prolixity. *Ib.* 91.

## TAXES.

1. *License-tax on sewing-machine companies; construction and constitutionality of.*—The statutory provision imposing a license-tax of \$25.00 on "every sewing-machine company selling sewing-machines, either themselves or by their agents, and all persons who engage in the business of selling sewing-machines" (Sess. Acts 1884-5, p. 17, §§ 8, 14, sub-d. 20), does not discriminate between companies and natural persons, but authorizes a conviction against either, on proof of a single sale, made under circumstances which show that it was done in the prosecution of the business; nor does the further provision contained in said subsection, which exempts from the payment of said tax "merchants engaged in a general business, keeping sewing-machines as a part of their stock in trade," make any unconstitutional discrimination. *Quartlebaum v. The State*, 1.
2. *Printer's fees for advertising sales of lands for delinquent taxes; when payable out of State treasury.*—Under the provisions of the act approved February 12th, 1879, amending section 439 of the Code (Sess. Acts 1878-9, p. 21), the printer's fee for advertising the sale of lands for delinquent taxes must be paid out of the State treasury, on the auditor's warrant in his favor, *only* when the State became the purchaser at the tax-sale, or when the fee has been collected and paid into the treasury. *Burke v. Blan*, 97.
3. *Same, for advertising notices to delinquent tax-payers.*—Under the provisions of the act approved February 12th, 1879, providing for the sale of lands for delinquent taxes (Sess. Acts 1878-9, pp. 1-7, §§ 3, 4, 10), the printer's fee for advertising notices to delinquent tax-payers is required to be ascertained by the judge of probate, and included in the amount for which a decree of sale is rendered, and is made payable out of the proceeds of sale; but, when the State becomes the purchaser, the auditor is not required to draw his warrant on the treasury in favor of the printer, except on the production of an order by the judge of probate. *Ib.* 97.
4. *State's right to money deposited in bank by tax-collector, to credit of treasurer.*—Although the tax-collector may have no authority to deposit in bank, to the credit of the State treasurer, moneys collected by him as State taxes; yet, if he does so deposit it, and the money is drawn or checked out by the treasurer, it becomes the money of the State in his hands, as much so as if it had been remitted by private hand.—*Wolffe v. The State*, 201.
5. *Action against person receiving public moneys with notice of their character.*—Money being deposited in bank by a tax-collector, to the credit of "I. H. Vincent, treasurer," and checked out by him in the purchase of exchange on New York, the draft being made payable to himself as treasurer, and indorsed in the same way; these facts are sufficient to charge the indorsee with notice of the official character in which the treasurer held the funds; and if he applies the money in payment of an individual indebtedness of the treasurer to him, he becomes liable to the State, as a trustee *in invitum*, in an action for money had and received. *Ib.* 201.



## TAXES—Continued.

6. *Same; ratification of unauthorized act.*—The institution of such action in the name of the State, by the direction of the governor, does not amount to a ratification of the illegal act, nor discharge the liability of the treasurer himself; nor is any special legislative sanction necessary to authorize or sustain the action. *Ib.* 201.
7. *Tax-deed as color of title.*—A tax-deed, though invalid as a muniment of title, may give color of title, and operate to fix and define the boundaries of an actual possession. *Hughes v. Anderson*, 209.
8. *Sale of lands for unpaid taxes; description of lands in tax-collector's docket, assessed to "owner unknown."*—Under the provisions of the act approved February 12th, 1879, relating to the sale of lands for delinquent taxes (Sess. Acts, 1878-9, pp. 3-8, § 1), lands assessed to "unknown owners" were required to be entered and described, in the docket filed by the collector in the office of the probate judge, "in the beat where the land is situate;" and the entries in this docket are the basis of the jurisdiction of the court to order a sale. But it is no objection to the validity of the sale, that several tracts of land, situated in different townships, are entered on the docket as assessed to "owners unknown," without specifying the particular beat or precinct in which the different tracts lie: as to these matters, in the absence of evidence, the court will not impute negligence to the officer, by presuming that the several tracts are in different beats. *Lowe v. Martin*, 366.
9. *Auditor's certificate to purchaser.*—Under the provisions of the act approved February 13th, 1879 (Sess. Acts 1878-9, p. 13, § 18), the auditor's certificate of transfer passed to the purchaser all the title acquired by the State as purchaser at the tax-sale; and it was not required to be either attested or acknowledged, as is now necessary to perfect his deed. *Ib.* 366.
10. *Limitation of action to recover lands sold for taxes.*—Five years is the statutory limitation of an action to recover lands sold for the non-payment of taxes (Code, § 464); and this has been judicially construed to mean five years from the delivery and registration of the deed, properly executed and acknowledged.—*Hughes v. Anderson*, 209.
11. *Same.*—The limitation of five years, prescribed as a bar to actions for the recovery of lands sold for delinquent taxes (Code, § 464), does not begin to run until the deed to the purchaser is properly recorded. *Bolling v. Smith*, 535.
12. *Sale of lands for delinquent taxes; recitals and registration of deed to purchaser.*—The deed of the judge of probate, to the purchaser of lands sold for delinquent taxes, is *prima facie* evidence of the facts therein recited (Code, § 460), *only* when executed in substantial compliance with the requirements of the statute, and properly recorded. *Ib.* 535.
13. *Legal and equitable remedies for collection of taxes.*—Taxes levied and assessed create a legal liability, which will support an action at law, although a statutory remedy is also given to enforce their payment; and where the legal remedy is inadequate, as where the owner of the property is a married woman, and the taxes have remained unpaid for a series of years, the lien on the property may be enforced in equity. *Winter v. City Council*, 481.
14. *Subscription to railroad by municipal corporation; levy of tax to pay interest on bonds.*—The power being granted to the corporate authorities of the city of Montgomery, by special statute, "to levy such taxes as may be necessary, upon the real and personal property in said city," to pay the interest on the city's subscription to the capital stock of the South and North Alabama Railroad Company, a levy on real property only was not void, the

TAXES—*Continued.*

failure to include personal property also being a mere irregularity ; and the action of the authorities being in its nature legislative and governmental, rather than corporate, the *onus* is on a party assailing it to show that a different rate of taxation was necessary. *Ib.* 481.

15. *Tax on appeal for benefit of Supreme Court library ; constitutionality of.*—The statute imposing a tax-fee of six dollars in each case decided on appeal by this court, for the benefit of the library (Sess. Acts 1882–83, p. 149), is a legitimate exercise of the taxing power, and is not violative of any constitutional provision. *Swan & Billups v. Kidd*, 431.

## TRESPASS.

1. *Uninclosed lands ; cattle running at large.*—In this State, except where the rule is changed by local statutes, uninclosed lands are regarded as common of pasturage, over which cattle or stock may be suffered to run at large ; and if the owner of the land desires to protect himself against damage, he must erect and maintain a lawful fence around them. *Wilhite v. Speakman*, 400.
2. *Same ; rights and liabilities of owner, in cases of trespassing cattle.* Where lands are not inclosed by a lawful fence (Code, §§ 1586–7), the rights of the owner, as against cattle or stock running at large, are only defensive : he may have the trespassing animals estrayed, and may use all proper means to drive them out of his field, taking care to employ no unnecessary force ; but for any injury which is the natural or proximate consequence of a wrongful act on his part, outside of these defensive measures, he is liable to the statutory penalty of five times the amount of the injury. *Ib.* 400.
3. *Same ; case at bar.*—The plaintiff's horse having been caught by the defendant while trespassing in his field, which was not inclosed with a lawful fence, and tied with a rope to the limb of a tree, where he was found dead the next morning, the appearances indicating that he had been choked to death ; the liability of the defendant to the statutory penalty does not depend on the question of negligence *vel non* in the treatment and care of the horse, but, his act being unlawful, on the question whether the death of the animal was the natural and proximate consequence thereof. *Ib.* 400.
4. *Statutory trespass on lands, cutting trees, &c., intent to convert.* Under the statute which makes it larceny for any person to enter on the lands of another, without his consent, and cut and carry away any timber or rails, "with the intention of converting them to his own use" (Code, § 4360), the specific intent is a material ingredient of the offense, and must be alleged in the indictment. *McCord v. The State*, 269.
5. *Trespass on leased premises by stranger.*—When the possession of the leased premises is open and unobstructed at the time of the renting, and there is only an implied covenant on the part of the lessor that they shall be open to entry, a subsequent trespass or intrusion by a third person is a wrong against the lessee ; but, if there is an express stipulation by the lessor to put the lessee in possession, such subsequent trespass, before the lessee has entered, is a wrong against the lessor. *Snodgrass v. Reynolds*, 452.

## TRUSTS.

1. *Charitable trusts ; what are, and jurisdiction of equity over.*—A charitable trust, as known and recognized at common law,\* and sustained by courts of equity, was public in its nature, and the per-

TRUSTS—*Continued.*

- sons to be benefited by it were vague, uncertain, and indefinite, until designated as the beneficiaries for the time being; and where a common fund is created by voluntary contributions, its benefits being restricted to members of the association, it can not be considered a charitable trust, nor subject as such to be controlled by a court of equity. *Burke v. Roper*, 138.
2. *Same.*—The jurisdiction of courts of equity over such voluntary associations and their funds is maintained, independent of the statute of uses, or of any prerogative power, on the ground of the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies. *Ib.* 138.
  3. *Same; jurisdiction to decree dissolution, and distribution of funds.* When the operations of such voluntary association have been discontinued, its objects and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the several contributors in proportion to the amount contributed or paid by them respectively. *Ib.* 138.
  4. *Same.*—A new association being formed on the dissolution of the old, composed of some of the members with other persons, members of the same church, and made subject to such laws and restrictions as the church might prescribe; while an unauthorized dismissal of some of the members, by the arbitrary act of the minister in charge, without a trial or hearing, might afford grounds for legal proceedings to compel their restoration, such nugatory act would not authorize a court of equity, at their instance, to decree a dissolution of the association, or a distribution of the common fund among the members. *Ib.* 138.
  5. *Express trust in lands; how created.*—An express trust in lands, resting on an agreement between the parties, can only be created or declared by an instrument in writing, signed by the party creating or declaring it (Code, § 2199), though no particular form of words is necessary; and while an assessment list for taxation, signed by the holder of the legal title, may be an admission on his part that he holds for the benefit of another, it can not operate as the creation or declaration of a trust in any part of the land, within the meaning of the statute. *Bibb v. Hunter*, 351.
  6. *Resulting trust arising from payment of purchase-money.*—To establish a resulting trust in lands, in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must be shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase-money, if money was paid, or other thing of value which constituted the consideration, or that the credit (if credit was given) was extended to him. *Ib.* 351.
  7. *Admissions of grantee, as evidence for party seeking to establish resulting trust.*—The presumption being that the conveyance speaks the truth, the *onus* is on the party who seeks to establish a resulting trust in the lands, to overcome this presumption by evidence full, clear and satisfactory; and the verbal admissions or declarations of the grantee, while admissible as evidence against him, are not sufficient, unless plain and consistent with themselves, or corroborated by circumstances. *Ib.* 351.
  8. *Same; testimony of complainant, as to transactions with deceased grantee.*—When a conveyance is taken to the grantee for life, with remainder to certain grandchildren by name, and another grandchild files a bill to establish a resulting trust in his own favor, on account of moneys advanced by him to make the purchase, the



TRUSTS—*Continued.*

complainant may testify to transactions between himself and the deceased grantee (Code, § 3058); but, the bill not being filed until after the death of the grantee, that fact must be considered in weighing such testimony, and renders more stringent the necessity for corroborating circumstances. *Ib.* 351.

9. *Resulting trust in part of lands purchased; variance.*—If the complainant's notes were given, at the time of the original transaction, for the deferred payments of purchase-money, while the cash payment was made by the grantee with his own funds, a resulting trust may be declared in a corresponding aliquot part of the land, although the notes were paid at maturity by the grantee himself; but this relief can not be granted, under a bill which alleges the payment of the entire purchase-money by the complainant, and claims a resulting trust in the entire tract of land. *Ib.* 351.
10. *Trust for married woman and children; what estate she takes, and when equity will not, at instance of creditors, enforce execution of trust, in her favor.*—When infant children, having obtained decrees against their guardian and his sureties on settlement of his accounts, transfer and assign such decrees to a trustee, upon trust so to proceed, in the enforcement of the decrees by execution, as to secure to them certain designated property free of expense, "and upon the further trust to purchase the remainder of the property sold under said execution, and to settle that part thereof held and owned by said M. [the guardian], and sold as his property, on his wife and children, in such proportions as said trustee may in his discretion consider fitting;" the wife of said M. does not take, under the deed of assignment, such an estate or interest in the property purchased and held by the trustee, as can be subjected in equity to the payment of debts contracted by her; nor will a court of equity, at the instance of her creditors, compel the trustee to execute a settlement in her favor. *Moses Bros. v. Micou*, 564.
11. *Removal of husband as trustee of wife's estate.*—On the testimony in this case, showing that the husband had permanently abandoned his wife, wasted her income by consuming it for his own personal use, grossly disregarded his fiduciary duties, was profligate and unfit for the discreet management of her property, the chancellor properly removed him as her trustee (Code, §§ 2717, 2728-9); and the character of her estate, whether statutory or equitable, is immaterial. *Kraft v. Lohman*, 323.

UNLAWFUL DETAINER. See CHANCERY, 10.

## USURY.

1. *Usury as defense to bill for foreclosure.*—Usury in the transaction may be set up in defense of a bill to foreclose a mortgage, filed by an assignee, unless the mortgagor has estopped himself from setting up that defense against the assignee; and the defense being established, the complainant can recover no interest. *Van Beil v. Fordney*, 76.
2. *Same; question of intent.*—Usury *vel non* is, ordinarily, a question of intent, to be determined by the stipulations of the contract, the attendant circumstances, and the acts of the parties, contemporaneous and subsequent; but, when the contract is usurious on its face, or when it appears that a greater rate of interest than the statute allows was knowingly taken, though taken through ignorance or mistake of law, the unlawful intent is presumed, and the form of the contract is immaterial. *Ib.* 76.

USURY—*Continued.*

3. *What contracts are usurious.*—A mortgage given to secure the payment of \$648, as the amount due on a loan of \$600 for twelve months, would be usurious, if it appeared that the money was loaned in several installments during the year, while the whole sum bore interest from the first day: but, where the mortgage refers to and describes the several drafts or notes which evidence the payment of the several installments, and authorizes a foreclosure on default being made as to any one or more of them, not specifying any date as the maturity of the entire loan, the mortgage is not usurious on its face: and the fact that the entire annual interest was paid at one time, for two or more years, does not render the transaction usurious. *Ib.* 76.
4. *Subsequent promise to pay illegal interest.*—When the original transaction is not usurious, a subsequent agreement to pay illegal interest in consideration of forbearance for an indefinite time, the original contract remaining in force without change, does not impart to it the taint of usury; and subsequent payments of illegal interest will be regarded as partial payments on the debt, with interest. *Ib.* 76.
5. *Usury in mortgage; estoppel by admission in answer.*—If a mortgagee, in his answer to a bill to redeem, admits the charge of usury, he is estopped from adducing evidence to the contrary; and he can only be allowed legal interest from the date of the loan. *Gresham v. Ware, 192.*

## VENDOR AND PURCHASER.

1. *Fraud in sale of chattels.*—On a sale of chattels, a misrepresentation of a material fact by the vendor, on which the purchaser has a right to rely, and on which he does in fact rely, as an inducement to the contract, is a fraud, and is available as a defense to an action for the purchase-money, or a separate cause of action in favor of the purchaser. *Brown v. Freeman & Bynum, 406.*
2. *Same; matter of opinion.*—A representation which is in the nature of an expressed opinion, does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances, it may often constitute a warranty. *Ib.* 406.
3. *Same; question for jury.*—Whether the representation was intended as the statement of a fact, or as the mere expression of an opinion, is a question for the determination of the jury, when it does not involve the construction of a written instrument. *Ib.* 406.
4. *Patent defects; examination by purchaser.*—Representations and warranties do not cover patent defects, such as are external and obvious on casual inspection; yet, except as to such defects, the purchaser may rely on the warranty, and is not bound to make any examination. *Ib.* 406.
5. *Offer to restore or rescind.*—Before the purchaser can defeat an action for the price, in the absence of fraud or warranty, he must offer to restore the goods; but he may set up, in defense of such action, fraud or want of consideration, without offering to restore the goods, or to rescind the contract. *Ib.* 406.
6. *Sale of manufactured article; when property passes to purchaser.* Under a contract for the sale and purchase of a manufactured article, the property does not pass to the purchaser by his order to the manufacturer and its acceptance: there must be the selection and appropriation of one particular article, and facts showing an intention to pass the title or property to the purchaser. *Jones & Co. v. Brewer, 545.*
7. *Same.*—When the manufacturer, on receipt of the order, selects a

VENDOR AND PURCHASER—*Continued.*

particular article, and forwards it by railroad, as directed, taking the bill of lading in his own name, attaching to it the draft for the price, and indorsing it to the freight agent at the place of destination, with instructions to "deliver to bearer," these facts show an intention to retain the title until payment, and a loss by accidental fire at the railroad depot falls on the seller. *Ib.* 545.

8. *Fraudulent purchase of goods by insolvent debtor, and subsequent transfer.*—When an insolvent debtor obtains goods on credit by misrepresentation or fraudulent concealment of his condition, the seller may disaffirm the sale, and reclaim the goods, as against the fraudulent purchaser, or any one claiming under him, with notice of the fraud; but he can not maintain a bill in equity to set aside the subsequent transfer of the goods on account of such fraud, when the transfer was made in absolute payment of an honest debt, a fair price allowed for the goods, and no benefit reserved to the insolvent debtor. *Hornthall, Whitehead, Weissman & Co. v. Schonfeld*, 107.
9. *Vendor's lien; waiver of.*—When the vendor executes a conveyance to the purchaser, taking the note of a third person, indorsed by the purchaser, for the agreed price, or the deferred payments, the vendor's lien, as arising by implication of law, is presumptively waived. *Kyle v. Zellenger*, 516.
10. *Reservation of lien by contract.*—When lands are sold on a cash basis, part of the price being paid in cash, part in the notes of third persons indorsed by the purchaser, and his due-bill taken for a small balance; an express stipulation in the conveyance, that the vendor "in no way waives the vendor's lien on said land by reason of said personal securities," does not show the reservation of a vendor's lien such as arises by implication of law, the liability of the purchaser on the indorsed note being only secondary, but creates a contract lien in the nature of an equitable mortgage, which may be enforced so soon as the note is due and unpaid, without waiting for a judgment and execution against the maker. *Ib.* 516.
11. *Damages, as between vendor and purchaser.*—As between the vendor and the purchaser of land, where the former is unable to make title, but is guilty of no fraud or wrongful conduct, the purchaser can only recover the purchase-money paid, with interest; but this rule is exceptional, and does not apply to sales of personal property, nor to executory sales of land. *Snodgrass v. Reynolds*, 452.
12. *Measure of damages for breach of covenant, or warranty of title.* In ordinary cases, the measure of damages which the purchaser is entitled to recover, on account of a breach of covenant of seizin, or warranty of title, is the purchase-money paid, with interest and costs of suit; but this rule does not apply to a sale of chattels, nor to cases of fraud, nor to a breach of covenant by a lessor to put the lessee in possession. *Clark v. Zeigler*, 346.
13. *Same, in case of incumbrance.*—When there is no failure of title to any part of the land, but an incumbrance on a portion of the tract, created by a prior conveyance of the right to enter and cut all the "saw-timber," the measure of damages is the diminished value of the entire tract, not exceeding the entire purchase-money paid, with interest. *Ib.* 346.
14. *When mortgagee, or assignee, is not purchaser for valuable consideration.*—When a mortgage is given merely as security for a pre-existing debt, no new consideration entering into the transaction, the mortgagee is not entitled to protection against an outstanding equity of which he had no notice, as a purchaser for valuable consideration; and if he transfers his interest as collateral security for an existing debt, without any new consideration, his assignee is not a purchaser for value. *Banks v. Long*, 319.



VENDOR AND PURCHASER—*Continued.*

15. *Protection to purchaser for value without notice.*—A purchaser for value, without notice, is entitled to protection against the equity of a surety to have the property of his principal first applied in satisfaction of the common debt; but, to make out such defense, the purchaser must not only state his purchase, and the *bona fide* payment of the consideration, with circumstantiality of detail, but must deny notice of the outstanding equity, and knowledge of any fact sufficient to put him on inquiry, down to the time of his payment of the purchase-money; and this denial must be positive, and must be made whether notice is charged or not. *Gresham v. Ware*, 192.
16. *Purchase pendente lite; substitution of trustee.*—A purchaser of property *pendente lite* takes it subject to the hazards of the pending litigation, and is bound by any decree afterwards rendered; and this rule applies with special force where a new trustee is substituted by the voluntary act of the parties, without the sanction of the court, pending a suit to enforce the trust. *Morton & Bliss v. N. O. & S. Railroad Co.*, 590.
17. *Agreement to pay rent, in default of paying purchase-money.*—Where lands have been sold and conveyed, a mortgage being taken to secure the balance of the purchase-money unpaid, a subsequent agreement between the parties, reduced to writing, by which the purchasers bind themselves, in the event of their failure to pay the balance of the purchase-money as stipulated, to deliver three bales of cotton as rent, creates the relation of landlord and tenant between them, with its attendant rights and incidents. *Thornton v. Strauss & Steinhardt*, 164.

## VERDICT.

1. *Amendment of verdict.*—When the verdict of the jury is not in proper form, the court may inform them of the defect, before they are discharged, and instruct them to retire and consider further of it; and the defendant can not complain of this action. *Allen v. State*, 34.
2. *Form and sufficiency of verdict.*—In a statutory action in the nature of ejectment, the suggestion of adverse possession and the erection of valuation improvements being found true, and the value of the improvements being assessed, or their excess above the rents (Code, §§ 2951–54), the verdict should go further, and assess the value of the lands without the improvements. *Coltart v. Moore*, 361.
3. *Judgment on insufficient verdict; how corrected.*—Such verdict being defective, the court may set it aside during the term, and award a *venire de novo*; and a judgment rendered on it would be reversed on appeal. *Ib.* 361.
4. *Same; waiver of irregularity.*—Judgment having been rendered on such defective verdict, but set aside, on motion, at a subsequent term, after which the cause was, for several terms, treated as a case pending and undecided; the irregularity, if any, in setting it aside, is waived, and the irregular order can not be vacated on motion, as a void judgment or order may be. *Ib.* 361.
5. *Sufficiency of verdict.*—Where each count in the indictment charges forgery in the second degree, a general verdict of guilty, not specifying the degree, is sufficient. *Wright v. The State*, 262.
6. *Sufficiency of verdict.*—The complaint containing the common counts and a special count, in which the structure and improvements sought to be charged are described with sufficient certainty; and issue being joined on the pleas of payment and set-off, with the general issue; a verdict finding “the issues in favor of

## VERDICT—Continued.

the plaintiff, \$100," though informal, is sufficient to support a judgment declaring a lien in his favor, for that sum, on the structure and improvements. *Bedsole v. Peters*, 133.

## WITNESS.

1. *Competency of donee or grantee as witness.*—A donee or grantee in a conveyance of property is not competent as an attesting witness to it; and if he signs it as one of the attesting witnesses, its execution can not be proved by him. *Coleman v. The State*, 49.
2. *Party testifying as to transactions with deceased.*—When a conveyance is taken to the grantee for life, with remainder to certain grandchildren by name, and another grandchild files a bill to establish a resulting trust in his own favor, on account of money advanced by him to make the purchase, the complainant may testify to transactions between himself and the deceased grantee (Code, § 3058); but, the bill not being filed until after the death of the grantee, that fact must be considered in weighing such testimony, and renders more stringent the necessity for corroborating circumstances. *Bibb v. Hunter*, 351.
3. *Testimony of witness or party, as to motive or intent.*—The motive or intent with which an act is done, or refused to be done, is an inferential fact, to which a witness can not testify, for want of the requisite knowledge; and the principle is, with us, extended to a party testifying as a witness for himself, because such testimony is not susceptible of contradiction. *Alu. Fertilizer Co. v. Reynolds & Lee*, 497; also, *Kyle v. Bellenger*, 516.
4. *Examination of witness; interruption by court.*—While a witness is under examination on the stand, it is alike the duty of the presiding judge to protect him, if unfairly dealt by, and to abstain from interference so long as the examination is properly conducted; and this court can not, on error or appeal, revise the exercise of this discretionary power, when the record does not show that any injury could have resulted from the interference. *Carney v. The State*, 14.
5. *To what witness may testify.*—A witness, testifying to the defendant's behavior or conduct towards the woman alleged to have been seduced by him, can not be permitted to state that he "acted towards her as a suitor," nor that he "acted towards her as a lover;" these being inferential facts to be found by the jury, and not such a "short-hand rendering of the facts" as a witness may state. *Ib.* 14.
6. *Opinion of witness; when admissible.*—As to the amount and value of the personal property in a city at a particular past time, or during specified years, the opinions of witnesses can not be received, when they do not appear to be founded on knowledge of the facts. *Winter v. City Council*, 481.
7. *Cross-examination of defendant, testifying as witness for himself.* When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness for himself, he can not be cross-examined, against his objection, as to former indictments against him for other offenses, which are not pertinent to the issue to be tried. *Smith v. The State*, 21.
8. *Impeaching witness.*—It is permissible for the defendant to prove the fact of a previous difficulty between himself and a witness for the prosecution, as tending to show ill-will, bias or prejudice on the part of the witness, and thereby discrediting him; but the particulars or merits of the difficulty can not be inquired into. *Jordan v. The State*, 9.
9. *Same.*—As affecting the credibility of a witness, it is permissible to

WITNESS—*Continued.*

show that he entertains, or has expressed, feelings of sympathy or hostility towards the party by or against whom he is introduced, but not towards a third person who did not take part in the difficulty. *Henry v. The State*, 42.

10. *Impeaching witness by proof as to former statements.*—When a witness testifies, on the trial, to material facts which he did not state when examined as a witness on the preliminary examination of the defendant, he may be impeached, a proper predicate being laid, by proof of such omission; and the principle is the same, when he neither denies nor admits the omission, simply saying that he does not recollect. *Brown v. The State*, 61.
11. *Presumption against party failing to produce witness.*—A party is not bound to produce all the witnesses who may know something about the transactions involved in the issues, nor is any presumption indulged against him on account of his failure to produce them; though, when a witness possesses peculiar knowledge, supposed to be favorable to the party who can produce him, the failure to produce him, if unexplained, is ground of suspicion against that party. *Carter v. Chambers*, 223.
12. *Charge as to witness swearing falsely; not authorized by mere conflict in testimony.*—A mere conflict in the testimony—as where one witness testifies that he heard one of the parties make a certain declaration, while others, also present at the time, testify that they did not hear it—does not authorize a charge to the jury as to the effect to be given to the testimony of a witness who has sworn falsely in one particular. *Ib.* 223.



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